TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 780.

THE PROCTER & GAMBLE COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED SEPTEMBER 12, 1911.

(22,856.)

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APPEAL FROM THE UNITED STATES COMMERCE COURT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1911.

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Respondents.

UNITED STATES OF AMERICA, *ss:*

Be it remembered, that in the United States Commerce Court, in the City of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Petition and Exhibits.

Filed February 22, 1911.

1 Commerce Court of the United States.

THE PROCTER & GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

Petition.

The petition of the complainant, The Procter & Gamble Company, respectfully shows:

I.

That the complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and is engaged in the manufacture and sale of soap, candles, glycerine and kindred products and by products thereof, and in the refining and sale of

cotton-seed oil and other oils and by-products thereof, with its principal place of business in the city of Cincinnati, Ohio.

II.

That the defendant, The Cincinnati, Hamilton & Dayton Railway Company, is a corporation under the laws of Ohio; that the defendant, The Baltimore & Ohio Southwestern Railroad Company, is a consolidated corporation under the laws of Ohio and Indiana; that the defendant, Norfolk & Western Railway Company, is a corporation under the laws of Virginia; that the defendant, The Staten Island Rapid Transit Railway Company, is a corporation under the laws of New York; that the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, is a corporation under the laws of Ohio and Indiana; that the defendant, Kansas City Southern Railway Company, is a corporation under the laws of Missouri; that the defendant, Kansas City Terminal Railway Company, is a corporation under the laws of Missouri; and that the defendant, Chicago, Rock Island & Pacific Railway Company, is a corporation under the laws of Illinois and Iowa.

3 III.

That the defendants above named are each common carriers engaged in the transportation of passengers and property by continuous carriage or shipment wholly by railroad between points in the states of Ohio, Indiana, West Virginia, Virginia, Illinois, New Jersey, Pennsylvania, New York, Missouri, Kansas, Nebraska and other states, and as such common carriers so engaged in interstate commerce are each subject to the provisions of the Act to Regulate Commerce approved February 24, 1887, and Acts amendatory thereof or supplementary thereto.

IV.

Complainant further states that in the transaction of its business aforesaid, it owns and operates or controls large manufacturing plants, among other places, at Ivorydale, in the County of Hamilton, State of Ohio, at Port Ivory, Staten Island, in the City and State of New York, and at Kansas City, in the County of Wyandotte, State of Kansas; that at Ivorydale it owns or controls approximately seven (7) miles, at Port Ivory two (2) miles, and at Kansas City two (2) miles, of private railroad tracks for the purpose of facilitating the switching and storage of cars used in its business, which tracks are located wholly on ground owned or controlled by the complainant; none of the defendant railway companies have any right, title or interest of any kind in any of said private tracks or the

4 ground on which they are located; said tracks at Ivorydale are connected with the tracks of the defendants, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, at Port Ivory with the tracks of the defendant, The Staten Island Rapid Transit Railway Company, and at Kansas City with

the tracks of the defendants, Kansas City Southern Railway Company, Kansas City Terminal Railway Company and Chicago, Rock Island & Pacific Railway Company, by designated interchange tracks; that for the purpose of economically conducting the business in which complainant is engaged as aforesaid it is necessary that it employ a large number of oil tank cars, as it is wholly impracticable to transport cotton seed oil and like products in ordinary freight cars; that the defendant railway companies and all other railway companies have neglected and refused to furnish complainant with any tank cars for use in its said business, so that complainant has been compelled to expend approximately five hundred thousand ($500,000.00) dollars in the purchase of private oil tank cars for use solely in its own business and is now the owner of approximately five hundred and thirty-two (532) of such cars; said cars are operated over the tracks of the defendant railway companies and other railway companies under the provisions of uniform published tariffs by which each of said railway companies pays the complainant three-fourths (¾) of one cent for each mile run by said cars over
5 said railway companies' tracks; that said tariffs have been in force and unchanged for many years, but the revenues derived by the complainant from the operation of its said tank cars thereunder have not been sufficient to yield it a reasonable return on its investment in said cars.

Complainant further states that in making said expenditures it relied upon the defendants maintaining said tariffs for the hauling of private tank cars in force, at least until they were able and willing to supply such equipment themselves, and that they would not, under the guise of demurrage rules or otherwise, increase the cost to complainant of owning and operating such cars.

V.

Complainant further states that it is frequently necessary in the proper conduct of its business that its said private tank cars be held by it under lading for periods of time longer than the free time allowed by the car demurrage rules hereinafter referred to; that the contents of approximately fifteen to twenty per cent. of its inbound cars are found by chemical analyses to be below the contract specifications therefor, and that in such cases it is necessary, for the purpose of adjusting the losses thereon, to hold said cars under lading for periods of from one to two weeks after their receipt by complainant; further, that on account of large inbound shipments at certain seasons of the year it is necessary to use said cars not for hauling, but for the purpose of storing oils, grease, tallow and
6 other commodities; that while said cars are so held under lading for analysis, or used for storage purposes as aforesaid, they are located only upon private tracks on property owned or controlled solely by complainant, and are not in any sense in the service of the defendant railway companies or any of them, said cars at the time having been delivered by said companies to complainant, and withdrawn from said interchange tracks and from railroad service, and said defendants having ceased to pay complain-

ant any charge for the use of said cars; and furthermore, the defendant railway companies state, in the bills of lading issue by them and otherwise, that all cars and their contents after delivery upon private tracks are held exclusively at the risk of the owner.

Complainant further states that said private oil tank cars are not suitable for the transportation of commodities other than those used by the complainant in its said business and can not be used by the defendants or other railway companies or by the general public for the transportation of ordinary commodities.

VI.

Complainant further states that on or about February 25, 1910, the defendant, The Cincinnati, Hamilton & Dayton Railway Company, issued a tariff schedule known as Local Freight Tariff No. 5049-A, publishing car demurrage rules for stations on the line of said railway within the state of Ohio, applying on interstate traffic only, effective April 1, 1910, which tariff has been duly filed with
the Interstate Commerce Commission, known as I. C. C. No.
7 2460, a copy of which tariff is hereto attached, marked Exhibit A; that on or about February 24, 1910, the defendant, The Baltimore & Ohio Southwestern Railroad Company, issued a certain tariff known as Local Freight Tariff No. H 2337, publishing car demurrage rules applying on all traffic at all stations and sidings on the line of said railroad company, except on intra-state traffic in the state of Ohio, effective April 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission, known as I. C. C. No. 6571, reference to which tariff is hereby made; that on or about February 28, 1910, the defendant, Norfolk & Western Railway Company, issued a certain local freight tariff known as Tariff No. 10414-E, publishing demurrage charges on interstate traffic at all stations on the line of said railway in the state of Ohio, effective April 1, 1910, which tariff has been filed with the Interstate Commerce Commission, known as I. C. C. No. 3750, reference to which tariff is hereby made; that on or about February 28, 1910, the defendant, The Staten Island Rapid Transit Railway Company issued a certain tariff, publishing car demurrage rules applying at stations on the line of said company, effective April 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission known as I. C. C. No. 694, reference to which tariff is hereby made; that on or about March 21, 1910, the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, issued a tariff known as Circular No. F-75, publishing car demurrage rules applying on interstate traffic on its lines in the state of Ohio, effective April 22,
8 1910, which tariff has been duly filed with the Interstate Commerce Commission, designated as I. C. C. No. 5185, reference to which tariff is hereby made; that on or about April 1, 1910, the defendant, Kansas City Southern Railway Company, issued a certain tariff known as Freight Tariff of Demurrage and Storage Charges, applying to interstate traffic, effective May 6, 1910, which tariff has been duly filed with the Interstate Commerce Commission, designated as I. C. C. No. 2762, reference to which tariff is

hereby made; that on or about March 29, 1910, the defendant, Kansas City Terminal Railway Company, issued a tariff known as Freight Tariff No. 2, publishing, among other things, car demurrage rules and charges applicable to interstate traffic, effective May 2, 1910, which tariff has been duly filed with the Interstate Commerce Commission, designated as I. C. C. No. 24, reference to which tariff is hereby made; and that on or about March 26, 1910, the defendant, Chicago, Rock Island & Pacific Railway Company issued a certain tariff known as Freight Tariff No. 21500-C, publishing, among other things, demurrage charges and rules applicable to interstate traffic on its lines, effective May 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission, designated as I. C. C. No. C-8854, reference to which tariff is hereby made.

Complainant further states that the car demurrage rules shown in the aforesaid tariffs published by all of the defendants other than The Cincinnati, Hamilton & Dayton Railway Company are substantially the same as those shown on the tariff issued by The Cincinnati, Hamilton & Dayton Railway Company, which is hereto attached, marked Exhibit A; that Rule I of said Car Demurrage Rules so issued by each of said defendants reads as follows:

"Rule I.

"Cars Subject to Rules.

"Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

"(*a*) Cars loaded with live stock.

"(*b*) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

"(*c*) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

"NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"(Empty private cars are in railroad service from the time they are placed by the carriers for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed)."

VII.

Complainant avers that under the provisions of said Rule I, the defendant railway companies assert the right to charge and collect

the demurrage charges provided for in said tariffs from complainant upon its said private tank cars while the same are standing upon its said private tracks under lading and after said tank cars have been delivered to complainant and withdrawn from said designated interchange tracks and from railroad service, and that said defendants are now charging and collecting such demurrage charges from complainant notwithstanding its protest against such collection.

VIII.

Complainant further states that on or about March 31, 1910, and before the taking effect of any of the aforesaid tariffs, it filed a petition with the Interstate Commerce Commission against the defendants, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company and The Staten Island Rapid Transit Railway Company, setting forth substantially the above facts, and alleging that said Rule 1, insofar as it provides that private cars under lading on private tracks are in railway service and subject to
11 the demurrage charges fixed by such tariffs until the load is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private tank cars upon private tracks for its own purposes without paying defendants demurrage charges therefor after said private tank cars have been delivered to complainant, and have actually ceased to be engaged in railway service; that the enforcement of said provision of said rule would permit the defendants to take complainant's property without compensation, and would deprive it of its property without due process of law, in violation of the Constitution of the United States and particularly of Article V in amendment thereof, and that said provision of said rule is in violation of the said Act to Regulate Commerce, and particularly of Sections 1 and 15 thereof as amended June 29, 1906; and complainant prayed in said petition that the defendants be required to answer the same, and that after due hearing and investigation, an order be made, commanding the defendants to cease and desist from said violation of said Act to Regulate Commerce, and for such other and further relief as might be deemed necessary or proper in the premises; that said cause was duly docketed in the Interstate Commerce Commission and numbered 3208 on the docket of said Commission.

Complainant further states that on or about April 23, 1910, it filed another petition with said Interstate Commerce Commission making the defendants, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company and Chicago, Rock
12 Island & Pacific Railway Company defendants therein; that said petition was filed before the taking effect of any of the aforesaid tariffs filed by said last named defendants, and set forth substantially the same facts as the petition filed on March 31, 1910, against said other defendants and asked the same relief; that by order made April 23, 1910, by said Interstate Commerce Commission, the said last named petition was designated as the first

amendment to said first named petition, and said causes were thereby consolidated into one, and both were numbered 3208 upon the docket of said Interstate Commerce Commission.

IX.

Complainant further states that subsequent to the filing of said petitions the defendants in said actions each filed answers thereto, substantially admitting the allegations of fact set forth in said petitions, but praying that said petitions be dismissed for the reason that the demurrage charges complained of therein were not in violation of the Constitution of the United States or of said Act to Regulate Commerce.

X.

Complainant further states that on October 19, 1910, said cause No. 3208 came on for hearing before the Interstate Commerce Commission at Washington; that evidence was then and there produced by the complainant which was not controverted by any of the defendants in any respect, and said undisputed evidence disclosed the facts as hereinabove set forth, and said cause was on said day submitted to said Interstate Commerce Commission on such evidence, and briefs and arguments of counsel.

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Complainant further states that on November 14, 1910, said Interstate Commerce Commission made a report in said cause finding that the defendants were within their lawful rights in establishing and maintaining the rule complained of, and on the same day made an order in said cause dismissing the complaint; that although said report and order purport to have been made on November 14, 1910, they were not handed down or made public, and complainant herein was not advised thereof until December 13, 1910. A copy of said report and order is hereto attached, marked Exhibit B.

XI.

Complainant avers that said order of said Interstate Commerce Commission in dismissing its complaint as above set forth, is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of Rule 1 of said demurrage rules; that said Rule 1, insofar as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without due process of law, in violation of the Constitution of the United States, and particularly of Article V in amendment thereof, and that said pro-

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vision of said rule is in violation of the said Act to Regulate Commerce and particularly of Sections 1 and 15 thereof as amended June 29, 1906; that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this Court, and defendant railway companies are enjoined from enforcing the provisions of said rule.

Wherefore, complainant prays that the aforesaid order of said Interstate Commerce Commission made in said cause No. 3208 on November 14, 1910, be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges upon complainant's loaded tank cars after said cars have been delivered to complainant and placed upon tracks owned or controlled by it; and further that said defendant railway companies and each of them be required to repay to complainant herein all sums found to have been wrongfully collected by them, or any of them, under the rule here complained of; and that complainant be granted such other and further relief as it may be entitled to in the premises.

THE PROCTER & GAMBLE COMPANY,
By GEORGE H. WARRINGTON, *Its Attorney.*

STATE OF OHIO,
County of Hamilton, ss:

Hastings L. French, being by me first duly cautioned and sworn, states that he is secretary of The Procter & Gamble Company, the complainant herein, and that the facts set forth in the foregoing petition are true as he verily believes.

HASTINGS L. FRENCH.

Sworn to and subscribed before me this 25th day of February, 1911.

[Notarial Seal, Hamilton County, Ohio.]

ROBERT S. MARX,
Notary Public in and for Hamilton County, Ohio.

Address of complainant's attorney: George H. Warrington, Citizens Bank Building, Cincinnati, Ohio.

20 EXHIBIT B.

Opinion No. 1427.

Before the Interstate Commerce Commission.

No. 3208.

PROCTER & GAMBLE COMPANY
v.
CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY et al.

Decided November 14, 1910.

Report and Order of the Commission.

21 No. 3208.

PROCTER & GAMBLE COMPANY
v.
CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY et al.

Submitted October 19, 1910; Decided November 14, 1910.

Complainant objects to defendants' rule as to demurrage charges in so far as it provides for demurrage on private cars while standing on private tracks, and particularly to the provision that if private cars are returned under load the railroad service is not at an end until the lading is removed; Held, That defendants are within their lawful rights in establishing and maintaining the rule complained of.

George H. Warrington for complainant.
Herbert Scoville for Indian Refining Company, intervener.
Edward Barton for Baltimore & Ohio Southwestern Railroad Company and Staten Island Rapid Transit Railway Company.
R. Walton Moore for Norfolk & Western Railway Company.
Evans Browne for Kansas City Southern Railway Company and Kansas City Terminal Company.

Report of the Commission.

CLARK, *Commissioner:*

Complainant owns large industrial plants at Ivorydale, Ohio, Port Ivory, N. Y., and Kansas City, Kans. In each of these plants it owns, maintains, and operates private tracks located upon its own land for use in, and for the purpose of, switching cars between the interchange tracks connecting with the lines of defendants and the various loading and unloading places within the plants. At Ivory-

dale and at Port Ivory complainant owns its own locomotives and performs the entire switching service within the plants. At the Kansas City plant all internal switching service is performed by a railroad company.

Complainant owns and has in service for the transportation of commodities used by it in its business some 500 oil-tank cars, which are used by defendants under a tariff which provides, among
22 other things, that when tank cars are furnished by shippers or owners, mileage at the rate of three-fourths of one cent per mile will be allowed by defendants for the use of such tank cars, loaded or empty.

Defendants' tariffs of demurrage charges contain the following rule, which this complaint alleges to be unreasonable and unjust:

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

Complainant objects to the rule quoted, in so far as it provides for demurrage on private cars while standing on private tracks, and particularly to the provision that if private cars are returned under load railroad service is not at an end until the lading is removed. It contends that after such cars have been removed from the interchange tracks and placed upon private tracks they are no longer in railroad service, but are private property in the possession of the owner, to be used as he wills; that the railroads have no interest in the tracks upon which the car then stands; that they have ceased to pay rental or mileage for the use of the car; that they are in no way responsible for the car, and can have no interest in it until it is again placed on the interchange tracks and tendered for shipment; that they can not require the owner to place the car again in service, and that the owner receives nothing from the railroad for the use of the car except when it is actually upon the railroad company's tracks. It is stated that upon arrival of car under load it may be unloaded and the railroad company be notified that car has been unloaded, and if owner so elects he may again load the car and use it for storage purposes as long as he chooses, and that no possible benefit comes to either the carrier or the public through the performance of this unnecessary labor.

Complainant alleges that the railroads do not attempt to provide themselves with tank cars, and that the shipper is therefore forced to provide tank cars himself or ship in barrels in the railroad's

equipment. It calls attention to the fact that on outbound loads defendants' rules and practices take no cognizance of the private car until it is placed upon the interchange track for movement by defendants, while on inbound loads they provide for the collection of demurrage after the car has been taken from the interchange
23 tracks to the owner's tracks within the plant.

The Indian Refining Company, a corporation engaged in the manufacture and sale of petroleum and its products, with principal offices at Cincinnati, Ohio, and refineries and distributing plants at several points in various states, intervened in support of complainant's contention.

There is no controversy as to the facts. Defendants argue that the demurrage rules as a whole have received careful and exhaustive consideration at the hands of those best qualified to pass upon them; that no obligation rests upon complainant to furnish cars, and that if he elects to do so, such cars must be subject to such reasonable rules and regulations as may be fixed by the carriers or the Commission, or by statute.

In Interstate Commerce Commission v. L. C. R. R. Co., 215 U. S., 452, it was held that this Commission has the power to require that private cars be taken into account by carriers in determining an equitable distribution of cars among shippers. The Commission's finding that if the private cars or specially consigned cars delivered to the owner or consignee equal or exceed his pro rata share of the available equipment at that time he may not be given additional cars from the carrier's equipment was upheld. Surely any arrangement for the use of private cars which causes, or results in, undue preference or unjust discrimination is repugnant to the underlying principle, as well as in conflict with the terms, of the act.

Defendants contend, and with much force, that the decision of the Supreme Court above referred to fully sustains the demurrage rule here complained of; that otherwise an industry having a supply of its own cars could insist that when such cars went on its private tracks they were entirely out of service and might not be considered as any part of the equipment, and it could therefore demand from the railroad company an additional supply of cars, contending that its own should not be treated as cars in commerce, but as buildings for storage, and, having so secured the desired equipment from the railroad company, it could again put its own cars into service, and thus defeat the operation of any fair rule for distribution of equipment.

Defendants urge that complainant voluntarily provided itself with these cars; that it has put them into the service of the carriers under defendants' tariff rules which provide, on the one hand, for the payment to complainant of mileage on its cars, and, on the other hand, for demurrage on said cars, and that complainant may not accept one provision of the tariff and reject the other.

Defendants' demurrage rules are what are commonly termed the "Uniform Demurrage Rules." They were prepared by a committee of the National Association of Railway Commissioners, composed of a representative from each state that has a railroad com-
24 mission, and a member of the Interstate Commerce Commission. The rules were fully considered and then adopted by

the convention of the association, and were later approved, but not prescribed, by this Commission. In its report to the convention this committee said that the rule here complained of "Is our unequivocal reply to the demand that private cars be accorded special privileges and immunities," and—

The utterly chaotic condition in which we found the private-car problem calls for a careful and dispassionate inquiry into fundamental principles. Beyond all doubt, the present confusion is to be charged directly to what a distinguished railroad official naively terms "those exceedingly indefinite arrangements between carriers and shippers respecting employment of private cars." It is a standing reproach to the railroad world that these contracts for the use of private cars should be so indefinite that the parties can dispute endlessly as to their terms. The situation would be ridiculous were it not so fraught with evil. Your committee is agreed that the carriers' regularly published tariffs should set forth in detail the terms under which private cars will be employed, and they should expressly stipulate that private cars while in railroad service shall be subject to the same demurrage rules as the carriers' regular equipment.

In a report made by the Committee on Car Distribution and Car Shortage to the preceding convention of the National Association of Railway Commissioners, the position that had been taken by the courts and by the Interstate Commerce Commission was epitomized as follows:

It is the carrier's duty to furnish all facilities of transportation, and it can not permit the presence of any equipment upon the line to work a discrimination as between shippers.

Referring to the above quotation, the committee which formulated the demurrage rules said:

That this is and ought to be the law will scarcely be disputed. Here, then, is the criterion by which the merits of any private-car rule must be determined. * * * It is urged that private cars be exempt when standing on private sidings. If this suggestion were adopted, the coal dealer who derives his supply from mines which ship in private equipment could hold the cars for days, if need be, and team directly to his customers, while his competitor who is served by railroad cars must unload promptly or suffer the demurrage penalty. The rule not only gives unlawful advantage to the consignee who receives his freight in cars of private ownership, but by putting a premium upon the use of private cars unduly prefers the consignor. * * * It is next suggested that private cars on private sidings be exempt from demurrage when the owners of the cars give their consent. This suggestion has all the vices of the one preceding it, with the additional fault, peculiarly its own—it puts it within the power of the car owner to discriminate as between consignees.

* * * * * * *

When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after transportation is concluded, it leaves the carrier's service. * * *

25 The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee.

* * * * * * *

A car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight.

The State of New York Public Service Commission, second district, recently held that the rule complained of was, in the instance under consideration, unreasonable, but it said:

We decide simply that the private car returning to the home plant under load is not subject to demurrage after the loaded car has been delivered to the owning industrial company and been taken by that company upon its exclusively owned and operated tracks.

Complainant goes further than to assert its right to be relieved from demurrage on its own cars when standing upon its own tracks within its own works, and asserts that a privately owned car while standing upon a privately owned track should be free from demurrage, even though the car were owned by one private interest and the track by another private interest. In other words, that owners of private tracks and owners of private cars should be permitted to exchange courtesies, and by mutual consent so relieve cars from the demurrage rules of the carriers. It seems obvious that the acceptance and application of that theory would involve all of the elements of undue preference and unjust discrimination.

The rule which defendants apply to complainant's cars is the same as that applied to all other privately owned tank cars, and the only question seems to be whether or not the demurrage rule is a condition attached to the use of the privately owned cars which defendants may lawfully maintain.

Manifestly, the law does not impose upon defendants the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both, and which is stated definitely in defendants' tariffs. These defendants have said in their tariffs that they will use the privately owned cars and pay three-fourths of one cent per mile for such use, and will subject them to the demurrage rules. Complainant, having its cars in use under those conditions, now asks that we relieve it from one of the conditions, which defendants are unwilling to relinquish.

We are of the opinion that defendants are within their lawful rights in establishing and maintaining the rule complained of.

The complaint will be dismissed.

26 *Order.*

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 14th Day of November, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 3208.

PROCTOR & GAMBLE COMPANY
v.
THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY et al.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

27 Duplicate.

Notice to Attorney General.

Issued March 11, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Respondents.

The President of the United States to Honorable George W. Wickersham as Attorney General of the United States:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Com-

merce Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this fourteenth day of March, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Original of above notice and copy of Petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 14th day of March, A. D. 1911. (Accepted by Blackburn Esterline.)

F. J. STAREK, *Marshal.*

28

Duplicate.

Summons.

Issued March 14, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Respondents.

The President of the United States to George E. Hamilton, Agent, The Cincinnati, Hamilton & Dayton Railway Company, Union Trust Building, Washington, D. C., Respondent:

You are hereby summoned and required within thirty days after service hereof to appear and answer unto a petition filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served upon you.

In case no answer shall be filed within the time named, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this fourteenth day of March, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Summons and copy of Petition served upon George E. Hamilton (accepted by Miss L. F. Dyer) this 14 day of March, A. D., 1911.

F. J. STAREK, *Marshal.*

29 Summons similar to the foregoing was issued and served March 14, 1911, upon each of the following named agents:

George E. Hamilton, Agent, The Baltimore & Ohio Southwestern Railroad Company, Union Trust Building, Washington, D. C.

George E. Hamilton, Agent, The Staten Island Rapid Transit Railway Company, Union Trust Building, Washington, D. C.

Thomas P. Littlepage, Agent, The Chicago, Rock Island & Pacific Railway Company, Union Trust Building, Washington, D. C.

Britton & Gray, Agents, The Kansas City Southern Railway Company, Munsey Building, Washington, D. C.

Britton & Gray, Agents, Kansas City Terminal Railway Company, Munsey Building, Washington, D. C.

C. N. Osgood, Agent, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Colorado Building, Washington, D. C.

R. Walton Moore, Agent, Norfolk & Western Railway Company, District National Building, Washington, D. C.

30 Duplicate.

Notice to Interstate Commerce Commission.

Issued March 15, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Respondents

The President of the United States to Edward A. Moseley as Secretary of the Interstate Commerce Commission:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Com-

merce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the Secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this fifteenth day of March, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Original of above notice and copy of Petition served upon Edward A. Moseley, Secretary of the Interstate Commerce Commission, this 15th day of March, A. D. 1911. (Accepted by W. H. Connelly.)

F. J. STAREK, *Marshal.*

31 *Appearance.*

Filed March 20, 1911.

In the United States Commerce Court.

In Equity. No. 9.

THE PROCTER & GAMBLE COMPANY
v.
THE UNITED STATES OF AMERICA et al.

Appearance.

To Mr. G. F. Snyder, Clerk of said Court:

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its Solicitor.

Dated March 20, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

32 *Motion to Dismiss.*

Filed March 21, 1911.

In the United States Commerce Court.

In Equity. No. 9.

THE PROCTER & GAMBLE COMPANY
v.
THE UNITED STATES OF AMERICA et al.

Motion to Dismiss.

Comes now the Interstate Commerce Commission, one of the parties respondent in the above-entitled suit, by its Solicitor, and moves this Honorable Court to dismiss the petition of the above-named petition, and in support of said motion shows:

That the allegations contained and the facts set forth in said petition are not sufficient to entitle said petitioner to the relief, or any of the relief, prayed for by said petitioner in and by its said petition.

Dated March 21, 1911.

INTERSTATE COMMERCE COMMISSION.
By P. J. FARRELL, *Its Solicitor.*

33 *Answer of Staten Island Rapid Transit Railway Company.*

Filed March 23, 1911.

Commerce Court of the United States.

No. 9.

THE PROCTOR AND GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA et al., Defendants.

Answer of the Staten Island Rapid Transit Railway Company.

Defendant The Staten Island Rapid Transit Railway Company now comes and for its answer shows:

I.

Defendant admits that the complainant is a corporation *under* engaged in business as alleged.

II.

This defendant is a corporation organized under the laws of Ohio.

III.

This defendant is a common carrier engaged in the transportation of passengers and property as alleged, and as such common carrier is subject to all lawful provisions of the Act to Regulate Commerce approved February 24, 1887.

IV.

This defendant admits that the complainant is the owner of about two miles of railroad track at Port Ivory, Staten Island, New York, which it uses for the purpose of facilitating the switching and storage of cars used in its business, and which tracks are located on ground owned or controlled by the complainant, and in which this defendant has no interest. Said tracks are connected with those of this defendant, as alleged in paragraph IV of the petition, by designated interchange tracks. It is further true that the complainant, for the purpose of conducting its business has expended money in the purchase of private tank cars of which it is now the owner, numbering, as this defendant is advised, approximately five hundred and thirty-two (532). Defendant has not information as to the value of said cars, but supposes the same to be correctly alleged in the petition. Said cars of the complainant are operated over the tracks of this defendant and other railway companies engaged in interstate commerce under agreements by which the defendant and such other companies pay complainant three-fourths of one cent per mile for the use of said cars while the same are run on said railroad companies' tracks, as provided by the published tariffs of this defendant and other railway companies relating to the transportation of private tank cars. With respect to the allegation of neglect and refusal on the part of the defendant to furnish such cars, it avers that the same have been furnished by the complainant in accordance with the practice of many large shippers who find it to their interest to supply their own cars for the handling of their own business. And defendant denies the other allegations of the fourth paragraph of the petition in so far as the same may be dee — herewith.

V.

This defendant states it is true that in the conduct of its business the complainant frequently holds private tank cars under lading for periods of time longer than the free time allowed by the car demurrage rules. But in so far as the practice of so holding them is alleged to be essential, defendant asks that the complainant be required to prove that such is the fact. It is true that said private oil tank cars are not as a rule suitable for the transportation of commodities other than those used by the complainant.

VI.

It is true that on or about February 28, 1910, this defendant issued a certain tariff publishing car demurrage rules applying on all traffic at all stations and sidings on its line, effective April 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission,

known as I. C. C. No. 694, and the same contains a rule such as that quoted in paragraph VI of the petition as Rule I.

VII.

It is true that under the provisions of said Rule 1 this defendant asserts the right to charge and collect demurrage charges from complainant upon complainant's said private tank cars while the same are standing upon complainant's own and other private side tracks and after they have been withdrawn from said designated interchange tracks. Defendant denies that it asserts the right to charge and collect such demurrage charges after said cars have been withdrawn from railroad service, and avers the fact to be that the arrangement whereby the cars of the complainant are furnished and used by this defendant is not only provided for in the tariff to which reference is made in paragraph VI of the petition, which provides for the payment of three-fourths of one cent per mile for the use of said cars, but is covered as well by the demurrage rules of this defendant whereby cars of complainant received loaded into the service of the defendant are deemed to continue in such service until the lading is duly removed. It is true, as alleged in paragraph VII of the petition, that this defendant is making said charges and collecting the same against the protest of the complainant.

VIII.

Defendant admits the allegations of the eighth paragraph of the petition.

IX.

Defendant admits that the allegations of the ninth paragraph of the petition are substantially true, but states that in its answer filed with the Interstate Commerce Commission this defendant averred that the charges on account of which complaint is made were assessed in accordance with its tariffs, as has hereinbefore been alleged in paragraph VII of this answer.

X.

This defendant admits that the said cause came on for hearing before the Interstate Commerce Commission and was heard upon evidence offered by the complainant, and submitted upon such evidence and upon the briefs and arguments of counsel, and that said Commission thereafter decided said case and made its order dismissing the complaint, as is alleged in the petition.

35 XI.

This defendant denies the allegations of the eleventh paragraph of the petition.

XII.

Further answering, this defendant protests that this court has no jurisdiction of this action, and no power or authority to set aside said

order of dismissal, and that the petition is insufficient in law upon its face, and asks that the same be dismissed without further hearing.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

(Sd.) By EDWARD BARTON, *Its Attorney.*

STATE OF OHIO,
County of Hamilton, ss:

Edward Barton, being by me first duly cautioned and sworn, states that he is the Attorney of The Staten Island Rapid Transit Railway Company, defendant herein, and that the facts set forth in the foregoing answer are true as he verily believes.

(Sd.) EDWARD BARTON.

Sworn to and subscribed before me this 22nd day of March, 1911.

(Sd.) WILLIAM A. EGGERS,
Notary Public in and for Hamilton County, Ohio. [SEAL.]

Address of defendant's attorney: Edward Barton, Third & Central Avenue, Cincinnati, Ohio.

36 *Answer of Baltimore and Ohio Southwestern Railroad Company.*

Filed March 23, 1911.

Commerce Court of the United States.

No. 9.

THE PROCTER AND GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA et al., Defendants.

Answer of the Baltimore and Ohio Southwestern Railroad Company.

Defendant The Baltimore and Ohio Southwestern Railroad Company now comes and for its answer shows:—

I.

Defendant admits that the complainant is a corporation engaged in business as alleged.

II.

This defendant is a consolidated corporation under the laws of Ohio and Indiana as alleged.

III.

This defendant is a common carrier engaged in the transportation of passengers and property as alleged, and as such common carrier

is subject to all lawful provisions of the Act to Regulate Commerce approved February 24, 1887.

IV.

This defendant admits that the complainant is the owner of about seven miles of railroad track at Ivorydale, in Hamilton County, Ohio, which it uses for the purpose of facilitating the switching and storage of cars used in its business, and which tracks are located on ground owned or controlled by the complainant, and in which this defendant has no interest. Said tracks are connected with those of this defendant and those of the other defendants, as alleged in paragraph IV of the petition, by designated interchange tracks. It is further true that the complainant, for the purpose of conducting its business has expended money in the purchase of private tank cars of which it is now the owner, numbering, as this defendant is advised, approximately five hundred and thirty-two (532). Defendant has not information as to the value of said cars, but supposes the same to be correctly alleged in the petition. Said cars of the complainant are operated over the tracks of this defendant and other railway companies engaged in interstate commerce under agreements by which defendant and such other companies pay complainant three-fourths of one cent per mile for the use of said cars while the same are run on said railroad companies' tracks, as provided by the published tariffs of this defendant and other railway companies relating to the transportation of private tank cars. With respect to the allegation of neglect and refusal on the part of the defendant to furnish such cars, it avers that the same have been furnished by the complainant in accordance with the practice of many large shippers who find it to their interest to supply their own cars for the handling of their own business. And defendant denies the other alle-
37 gations of the fourth paragraph of the petition in so far as the same may be deemed inconsistent herewith.

V.

This defendant states it is true that in the conduct of its business the complainant frequently holds private tank cars under lading for periods of time longer than the free time allowed by the car demurrage rules. But in so far as the practice of so holding them is alleged to be essential, defendant asks that the complainant be required to prove that such is the fact. It is true that said private oil tank cars are not as a rule suitable for the transportation of commodities other than those used by the complainant.

VI.

It is true that on or about February 24, 1910, this defendant issued a certain tariff known as Local Freight Tariff H-2337, publishing car demurrage rules applying on all traffic at all stations and sidings on the line of this defendant excepting on interstate traffic in the state of Ohio, effective April 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission, known as

I. C. C. No. 6571, and the same contains a rule such as that quoted in paragraph VI of the petition as Rule I.

VII.

It is true that under the provisions of said Rule 1 this defendant asserts the right to charge and collect demurrage charges from complainant upon complainant's said private tank cars while the same are standing upon complainant's own and other private side tracks, and after they have been withdrawn from said designated interchange tracks. Defendant denies that it asserts the right to charge and collect such demurrage charges after said cars have been withdrawn from railroad service, and avers the facts to be that the arrangement whereby the cars of the complainant are furnished and used by this defendant is not only provided for in the tariff to which reference is made in paragraph VI of the petition, which provides for the payment of three-fourths of one cent per mile for the use of said cars, but is covered as well by the demurrage rules of this defendant whereby cars of complainant received loaded into the service of the defendant are deemed to continue in such service until the same is duly removed. It is true, as alleged in paragraph VII of the petition, that this defendant is making said charges and collecting the same against the protest of the complainant.

VIII.

Defendant admits the allegations of the eighth paragraph of the petition.

IX.

Defendant admits that the allegations of the ninth paragraph of the petition are substantially true, but states that in its answer filed with the Interstate Commerce Commission this defendant averred that the charges on account of which complaint is made were assessed in accordance with its tariffs, as has hereinbefore been alleged in paragraph VII of this answer.

X.

This defendant admits that the said cause came on for hearing before the Interstate Commerce Commission and was heard upon evidence offered by the complainant, and submitted upon such evidence and upon the briefs and arguments of counsel, and that said Commission thereafter decided said case and made its order dismissing the complaint, as is alleged in the petition.

38 XI.

This defendant denies the allegations of the eleventh paragraph of the petition.

XII.

Further answering, this defendant protests that this court has no jurisdiction of this action, and no power or authority to set aside

said order of dismissal, and that the petition is insufficient in law upon its face, and asks that the same be dismissed without further hearing.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
(Sd.) By EDWARD BARTON,
General Attorney.

STATE OF OHIO,
County of Hamilton, ss:

Edward Barton, being by me first duly cautioned and sworn, states that he is General Attorney of The Baltimore and Ohio Southwestern Railroad Company, defendant herein, and that the facts set forth in the foregoing answer are true as he verily believes.
(Sd.) EDWARD BARTON.

Sworn to and subscribed before me this 22nd day of March, 1911.
(Sd.) [SEAL.] WILLIAM A. EGGERS,
Notary Public in and for Hamilton County, Ohio.

Address of defendant's attorney:—Edward Barton, Third & Central Avenue, Cincinnati, Ohio.

39 *Notice of Appearance.*

Filed March 25, 1911.

In the United States Commerce Court.

In Equity. No. 9.

THE PROCTER & GAMBLE COMPANY
v.
THE UNITED STATES OF AMERICA et al.

Notice.

To Mr. George H. Warrington, Solicitor for the above-named petitioner:

Please take notice that I have today entered herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its Solicitor.
Dated March 20, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

I hereby accept service of the above notice this 23rd day of March, 1911.

GEORGE H. WARRINGTON,
Solicitor for the Procter & Gamble Company, Petitioner.

40 *Answer of Norfolk and Western Railway Company.*

Filed March 29, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA et al., Respondents.

The Separate Answer of the Norfolk & Western Railway Company to the Petition Filed in the Above Entitled Proceeding.

For answer, respondent says as follows:

1. Respondent admits the correctness of the allegations contained in the first three paragraphs of the petition.

2. Respondent believes that the allegations contained in Paragraph IV of the petition are correct, except that it is without information enabling it either to admit or deny such of said allegations as pertain to expenditures made by petitioner, the revenues derived from its investments, and its reliance upon the maintenance of tariffs heretofore in effect; and in respect to the alleged neglect or refusal to furnish cars, it avers that cars have been provided by petitioner in accordance with the practice of many shippers who find it to their interest to supply their own cars for the handling of their own business.

3. Respondent is without information enabling it either to admit or deny the correctness of all the allegations contained in Paragraph V of the petition.

4. Respondent believes that the allegations contained in Paragraph VI of the petition are correct.

5. Respondent, in respect to the allegations contained in
41 Paragraph VII of the petition, admits that it is enforcing its lawfully published tariff.

6. Respondent admits the substantial correctness of the allegations contained in Paragraphs VIII, IX and X of the petition, except that it asks that reference may be made to the record in the proceeding which was conducted before the Interstate Commerce Commission, for verification of details, and it particularly asks that reference may be made to the answer which it filed in said proceeding, and that the recitals thereof may be considered as reiterated herein.

7. The correctness of the allegations contained in Paragraph XI of the petition is denied.

And having fully answered, respondent prays to be hence dismissed, etc.

NORFOLK & WESTERN RAILWAY COMPANY,
By R. WALTON MOORE, *Special Counsel.*

42 *Appearance.*

Filed March 30, 1911.

The United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE CO.
vs.
THE UNITED STATES OF AMERICA et al.

To the Clerk of said court:

Please enter my appearance as Counsel for respondent, the Norfolk & Western Railway Company, in the above entitled cause.

R. WALTON MOORE, *Counsel.*

43 *Answer of Kansas City Terminal Railway Company.*

Filed March 30, 1911.

In the Commerce Court of the United States.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

Separate Answer of Defendant Kansas City Terminal Railway Company.

Now on this day comes Kansas City Terminal Railway Company and for its answer to the petition of The Procter & Gamble Company hereby, respectfully states:

I.

This defendant is not specifically informed as to whether the complainant is a corporation organized under the laws of the State of Ohio and is engaged in the business with its principal place of business at the place named in paragraph I of said petition and therefore denies the same.

II.

This defendant admits that it is a corporation organized under the laws of the State of Missouri.

III.

This defendant denies that it is a common carrier engaged in the transportation of passengers and property by continuous carriage or shipment wholly by railroad between points in the States of Ohio, Indiana, Illinois, Missouri, Kansas, Iowa, Colorado, Oklahoma, Texas, Nebraska and other States. This defendant specifically avers that it is not engaged in the transportation of passengers at all; that it is simply a switching line but admits that as such switching line it is, to a certain extent, engaged in interstate commerce.

IV.

This defendant admits that the complainant owns a manufacturing plant at Kansas City, in the County of Wyandotte, State of Kansas and at Ivorydale in the County of Hamilton, State of Ohio, and at Port Ivory, Staten Island, in the City and State of New York and that it owns private railroad tracks at Kansas City but as to the length of such tracks and as to whether it owns or controls approximately seven (7) miles at Ivorydale and (2) miles at Port Ivory, this defendant is not sufficiently informed and therefore denies the same.

This defendant admits that it is impracticable to transport cotton seed oil and other products in ordinary freight cars but denies that this defendant has neglected and refused to furnish complainant any tank cars which it was obligated to furnish but expressly states that this defendant does not own or control any tank cars or other cars and does not hold itself out to furnish the same.

As to whether the complainant is now the owner of approximately five hundred thirty-two (532) private cars, this defendant is not sufficiently informed and therefore denies the same and this defendant expressly denies that the cars are operated over the tracks of this defendant under any tariff providing for a payment of three-fourths (¾) of one cent for each mile run by said cars over this defendant's tracks, but as to whether the other defendants have such tariff provisions this defendant is not sufficiently informed and therefore denies the same.

As to whether the revenues derived by the complainant from the operation of its tank cars have been sufficient to yield it a reasonable return on this investment and as to whether complainant relied on said tariffs in making its investment this defendant is not sufficiently informed and therefore denies the same.

V.

As to whether it is necessary to hold the tank cars under lading for long periods for purposes of storing and as to whether said cars

can be used for transportation of other commodities this defendant is not sufficiently informed and therefore denies the same.

VI.

This defendant admits that on or about March 29, 1910, this defendant issued a tariff known as freight tariff number 2, publishing among other things car demurrage rules and charges applicable to interstate traffic effective May 2, 1910, which tariff has been duly filed with the Interstate Commerce Commission designated as I. C. C. Number 24, but as to whether the other defendants have published and filed tariffs as alleged in paragraph VI of the petition of complainant herein, this defendant is not sufficiently informed to answer the allegations with reference thereto.

As to whether rules in the tariffs of the other defendants are identical with those shown in the tariff issued by defendant The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, this defendant is not sufficiently informed to answer the allega-
46 tion in reference thereto contained in paragraph VI of complain-t's petition but this defendant specifically denies that the car demurrage rules contained in the tariff of this defendant are identical with those shown in the tariff issued by the defendant The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or with rule "I" as set forth in paragraph VI of complainant's petition herein but this defendant admits that its rule I as set forth in defendant's freight tariff number two, I. C. C. number 24, herein before referred to, is identical with said rule "I", except that exception B, as contained in said rule I, is not in the rules set forth in this defendant's tariff and that exception C as set forth in said rule I is referred to as exception B in the rules set forth in this defendant's tariff.

VII.

Defendant admits that under the provisions of said rule I it asserts the right to charge and collect demurrage charges provided for in its said tariff.

VIII.

This defendant admits that complainant heretofore filed its petitions on account of the matters involved in this petition with the Interstate Commerce Commission and that the cause was docketed in the Interstate Commerce Commission as alleged in paragraph VIII of the petition herein.

IX.

Defendant admits that it filed answer to said petition but denies that its answer substantially admitted the allegations of fact set forth in said petitions.

X.

Defendant admits that the cause came on for hearing before the Interstate Commerce Commission and that the Interstate Commerce

Commission found that said demurrage rules were proper and
47 dismissed the complaint but as to the date when the opinion of the Commission was made public, this defendant is not advised.

XI.

This defendant denies that the order of the Interstate Commerce Commission dismissing said complaint is null or void or beyond its power or is unjust and unreasonable or that complainant's property is taken without compensation or without due process of law or that said rule is in violation of the act to regulate commerce.

KANSAS CITY TERMINAL RAILWAY COMPANY,
By S. W. MOORE &
S. W. SAWYER,
Its Solicitors.

48 *Motion to Dismiss.*

Filed March 31, 1911.

In the United States Commerce Court, April Term, 1911.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,
v.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

Motion of the United States to Dismiss the Petition.

The Attorney General of the United States of America, in behalf of the United States, moves the court to dismiss the petition upon the following grounds, viz:

(1) It appears from the petition and the exhibits referred to therein and attached thereto that this court has no jurisdic-
49 tion to entertain the same, because the order of the Interstate Commerce Commission complained of directed no affirmative relief, and the negative order of the commission dismissing the complaint affords no basis for an action in this court.

(2) The said petition and the exhibits referred to therein and attached thereto state no cause of action, for that when the Proctor & Gamble Co. invoked the action of the Interstate Commerce Com-

mission to hear and determine its complaint, the commission acted within its power in ordering the same dismissed, and the petition here filed with the exhibits attached sets forth no sufficient reason to justify a disturbance of that order.

(3) It appears from the petition and the exhibits referred to therein and attached thereto that the complainant seeks here the same relief which it sought from and was denied by the Interstate Commerce Commission, when this court has no power to act for and instead of said commission, or to make orders and establish rules regulating the conduct and business of common carriers subject to the acts to regulate commerce.

(4) It appears from the petition that there is a misjoinder of parties defendant, in this: According to the statute, neither of the following defendants, to wit, The Cincinnati, Hamilton & Dayton Railway Co., The Baltimore & Ohio Southwestern Railroad Co., Norfolk & Western Railway Co., The Staten Island Rapid
50 Transit Railway Co., The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., Kansas City Southern Railway Co., Kansas City Terminal Railway Co., and Chicago, Rock Island & Pacific Railway Co., is a necessary or proper party defendant, or a permissible party to this proceeding, except on its own motion.

(5) This court has no jurisdiction or power to grant the relief prayed for by the Procter & Gamble Co., because:

(*a*) It prays that the order of the Interstate Commerce Commission be enjoined, when said order directed no action against any party and therefore the same is not subject either to enforcement or to injunction.

(*b*) It prays that the defendant common carriers, who are not proper parties to this proceeding except on their own motion, be enjoined from collecting the demurrage mentioned, when no order inhibiting the same has been made by the Interstate Commerce Commission, and in the absence of such an order this court has no power to grant such relief.

(*c*) It prays that the defendant common carriers be required to repay to complainant all sums heretofore wrongfully collected as demurrage, when this court has no power or jurisdiction to grant such relief, either with or without an order of the Interstate Commerce Commission directing such repayment.

51 (6) It appears from the face of the said petition that the same is in other respects irregular and insufficient.

Wherefore this defendant prays that its motion be sustained and that the petition be dismissed; and for such other and further action as may be appropriate in the premises.

GEO. W. WICKERSHAM,
Attorney General of the United States.

March, 1911.

52 *Certificate.*

Filed March 31, 1911.

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,
v.
THE UNITED STATES OF AMERICA et al., Defendants.

Under date March 31, 1911, a copy of the motion of the United States to dismiss the petition in the above entitled cause was mailed from the Department of Justice, Washington, D. C., to each of the following named persons, viz:

George H. Warrington, Esq., Citizens National Bank Building, Cincinnati, Ohio.

Honorable E. A. Moseley, Secretary, Interstate Commerce Commission, Washington, D. C.

C. N. Osgood, Esq., Agent, The Cleveland, Cincinnati, Chicago & St. Louis Rwy. Co., Colorado Building, Washington, D. C.

R. Walton Moore, Esq., Agent, Norfolk & Western Railway Co., District National Bank Bldg., Washington, D. C.

George E. Hamilton, Esq., Agent, Cincinnati, Hamilton & Dayton Rwy. Co., Union Trust Building, Washington, D. C.

George E. Hamilton, Esq., Agent, The Baltimore & Ohio Southwestern R. R. Co., Union Trust Building, Washington, D. C.

George E. Hamilton, Esq., Agent, The Staten Island Rapid Transit Rwy. Co., Union Trust Building, Washington, D. C.

Thomas P. Littlepage, Esq., Agent, Chicago, Rock Island & Pacific Rwy. Co., Union Trust Building, Washington, D. C.

Messrs. Britton and Gray, Agents, The Kansas City Southern Rwy. Co., Munsey Building, Washington, D. C.

Messrs. Britton and Gray, Agents, Kansas City Terminal Rwy. Co., Munsey Building, Washington, D. C.

(Signed) BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

53 *Answer of Cincinnati, Hamilton & Dayton Railway Company.*

Filed April 3, 1911.

Commerce Court of the United States.

No. 9.

THE PROCTOR & GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA et al., Defendants.

Answer of the Defendant The Cincinnati, Hamilton & Dayton Railway Company.

The defendant, The Cincinnati, Hamilton & Dayton Railway Company, for answer to complainant's petition says:

I.

This defendant admits that the complainant is a corporation engaged in business as alleged.

II.

This defendant is a corporation under the laws of Ohio.

III.

This defendant is a common carrier engaged in the transportation of passengers and property as alleged, and as such common carrier is subject to all lawful provisions of the Act to Regulate Commerce approved February 24, 1887.

IV.

This defendant admits that the complainant is the owner of about seven miles of railroad track at Ivorydale, in Hamilton County, Ohio, which it uses for the purpose of facilitating the switching and storage of cars used in its business, and which tracks are located on ground owned or controlled by the complainant, and in which this defendant has no interest. Said tracks are connected with those of this defendant and those of the other defendants, as alleged in paragraph IV of the petition, by designated interchange tracks. It is further true that the complainant, for the purpose of con-
54 ducting its business, has expended money in the purchase of private tank cars of which it is now the owner, numbering, as this defendant is advised, approximately five hundred and thirty-two (532). Defendant has not information as to the value of said cars, but supposes the same to be correctly alleged in the petition. Said cars of the complainant are operated over the tracks of this defendant and other railway companies engaged in interstate commerce under agreements by which the defendant and such other

companies pay complainant three-fourths of one cent per mile for the use of said cars while the same are run on said railroad companies' tracks, as provided by the published tariffs of this defendant and other railway companies relating to the transportation of private tank cars. With respect to the allegation of neglect and refusal on the part of the defendant to furnish such cars, it avers that the same have been furnished by the complainant in accordance with the practice of many large shippers who find it to their interest to supply their own cars for the handling of their own business. And defendant denies the other allegations of the fourth paragraph of the petition in so far as the same may be deemed inconsistent herewith.

V.

This defendant states it is true that in the conduct of its business the complainant frequently holds private tank cars under lading for periods of time longer than the free time allowed by the car demurrage rules. But in so far as the practice of so holding them is alleged to be essential, defendant asks that the complainant be required to prove that such is the fact. This defendant further avers that said cars are in railway service until the lading is removed. It is true that said private oil tanks are not as a rule suitable for the transportation of commodities other than those used by the complainant.

VI.

It is true that on or about February 25th, 1910, this de-
55 fendant issued a tariff schedule known as Local Freight Tariff No. 5049-A, publishing car demurrage rules for stations on the line of said railway within the State of Ohio, applying on interstate traffic only, effective April 1st, 1910, which tariff has been duly filed with the Interstate Commerce Commission, known as I. C. C. No. 2466, and that said tariff contains a rule such as that quoted in paragraph VI of the petition as Rule I.

VII.

It is true that under the provisions of said Rule I, this defendant asserts the right to charge and collect demurrage charges from complainant upon complainant's said private tank cars while the same are standing upon complainant's own and other private side tracks, and after they have been withdrawn from said designated interchange tracks. Defendant denies that it asserts the right to charge and collect such demurrage charges after said cars have been withdrawn from railroad service, and avers the fact to be that the arrangement whereby the cars of the complainant are furnished and used by this defendant is not only provided for in the tariff to which reference is made in paragraph VI of the petition, which provides for the payment of three-fourths of one cent per mile for the use of said cars, but is covered as well by the demurrage rules of this defendant whereby cars of complainant received loaded into the service of the defendant are deemed to continue in such service until the lading is duly removed. It is true, as alleged in paragraph VII of

the petition, that this defendant is making said charges and collecting the same against the protest of the complainant.

VIII.

Defendant admits the allegations of the eighth paragraph of the petition.

IX.

Defendant admits that the allegations of the ninth paragraph of the petition are substantially true, but states that in its answer
56 filed with the Interstate Commerce Commission this defendant averred that the charges on account of which complaint is made were assessed in accordance with its tariffs, as has hereinbefore been alleged in paragraph VII of this answer.

X.

This defendant admits that the said cause came on for hearing before the Interstate Commerce Commission and was heard upon evidence offered by the complainant, and submitted upon such evidence and upon the briefs and arguments of counsel, and that said Commission thereafter decided said case and made its order dismissing the complaint, as is alleged in the petition.

XI.

This defendant denies the allegations of the eleventh paragraph of the petition.

XII.

Further answering, this defendant protests that this court has no jurisdiction of this action, and no power or authority to set aside said order of dismissal, and that the petition is insufficient in law upon its face, and asks that the same be dismissed without further hearing.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
(Sd.) By MORRISON R. WAITE,
General Solicitor.

(Sd.) EDWARD BARTON,
Of Counsel.

STATE OF OHIO,
County of Hamilton, ss:

Morison R. Waite, being by me first duly cautioned and sworn, states that he is General Solicitor of The Cincinnati, Hamilton & Dayton Railway Company, defendant herein, and that the facts set forth in the foregoing answer are true as he verily believes.

(Sd.) MORISON R. WAITE.

Sworn to and subscribed before me this 30th day of March, 1911.

[SEAL.] (Sd.) PAUL DEWALD,
Notary Public in and for Hamilton County, Ohio.

Address of defendant's attorney: Morison R. Waite, Carew Bldg., Cincinnati, Ohio.

57 *Journal Entry.*

Proceedings of April 3, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES OF AMERICA et al., Respondents.

Upon request of counsel for the United States said cause was set for hearing Thursday morning April 6, on the motion to dismiss, and the clerk was directed to advise counsel for the petitioner accordingly.

58 *Answer of Chicago, Rock Island & Pacific Railway Company.*

Filed April 10, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES OF AMERICA et al., Respondents.

Answer of Respondent The Chicago, Rock Island & Pacific Railway Company.

This respondent, The Chicago, Rock Island & Pacific Railway Company, for answer to complainant's petition, says:

I.

This respondent admits that the petitioner is a corporation engaged in business, as alleged.

II.

This respondent admits that it is a corporation organized under the laws of Illinois and Iowa.

III.

This respondent admits that it is a common carrier engaged in the transportation of passengers and property, as alleged, and as such

is subject to all lawful provisions of the Act to regulate commerce, approved February 24, 1887.

IV.

This respondent admits that the petitioner owns or controls certain railroad tracks at Kansas City, in the County of Wyandotte, State of Kansas, which it uses for the purpose of facilitating the switching and storage of cars used in its business, and which tracks are located on ground owned or controlled by the petitioner and in which this respondent has no interest. Said tracks are con-
59 nected with those of this defendant, as alleged in Paragraph IV. of the petition, by designated interchange tracks. It is further true that complainant, for the purpose of conducting its business, has expended money in the purchase of private tank cars of which it is now the owner, numbering, as this defendant is advised, approximately five hundred and thirty-two. This respondent has no information as to the value of said cars. Said cars of the petitioner are operated over the tracks of this respondent and other railway companies engaged in interstate commerce under agreements by which the respondent and such other railway companies pay to the petitioner three-fourths of one cent per mile for the use of said cars while the same are run on said railway companies' tracks, as provided by the published tariffs of this respondent and other railway companies relating to the transportation of private tank cars. In answer to the allegation of neglect and refusal on the part of this respondent to furnish such cars, it avers that the same have been furnished by the petitioner in accordance with the practice of many large shippers, who find it to their interest to supply their own cars for the handling of their business. Respondent denies the allegations of Paragraph IV. of the petition insofar as the same may be deemed inconsistent herewith.

V.

This respondent states it is true that in the conduct of its business the petitioner frequently holds private tank cars under lading for periods of time longer than the free time allowed by the car demurrage rules. But, insofar as the practice of thus holding them is alleged to be essential, respondent requests that the petitioner
60 be required to prove that such is the fact. This respondent avers that said cars are in railway service until the lading is removed. It is true that said private oil tank cars are not, as a rule, suitable for the transportation of commodities other than those used by petitioner.

VI.

This respondent admits that, on or about March 26, 1910, this respondent issued a tariff schedule known as Freight Tariff No. 21500-C, publishing car demurrage rules for stations on its lines of railway applying on interstate traffic, effective May 1, 1910, which tariff has been duly filed with the Interstate Commerce Commission,

known as I. C. C. No. 8854, and that said tariff contains a rule such as that quoted in Paragraph VI. of the petition as Rule I.

VII.

This respondent admits that, under the provisions of said rule I., this respondent asserts the right to charge and collect demurrage charges from petitioner upon petitioner's said private tank cars while the same are standing upon petitioner's own and other private side tracks, and after they have been withdrawn from said designated interchange tracks. Respondent denies that it asserts the right to charge and collect such demurrage charges after said cars have been withdrawn from railway service, and states the fact to be that the arrangement whereby the cars of the petitioner are furnished and used by this respondent is not only provided for in the tariff to which reference is made in Paragraph VI. of the petition, which provides for the payment of three-fourths of one cent per mile for the use of said cars, but is covered as well by the demurrage rules of this respondent, whereby cars of petitioner received loaded into the service of the respondent are deemed continued in the service of said re-
61 spondent until the lading is duly removed. This respondent admits, as alleged in Paragraph VII. of the petition, that this respondent is making said charges and collecting the same against the protest of the petitioner.

VIII.

This respondent admits the allegations of the eighth paragraph of the petition.

IX.

This respondent admits that the allegations of Paragraph IX. of the petition are substantially true; but states that, in its answer filed with the Interstate Commerce Commission, it averred that the rule under which the said charges are assessed was published in its tariffs and duly filed with the Interstate Commerce Commission, and that the said rule was adopted and incorporated in its tariffs upon the recommendation of the Interstate Commerce Commission contained in Circular Letter No. 2, Series 1909, dated Washington, D. C., December 18, 1909.

X.

This respondent admits that the said cause came on for hearing before the Interstate Commerce Commission and was heard upon evidence offered by the complainant, and submitted on such evidence and upon the briefs and arguments of counsel, and that said Commission thereafter decided said case and made its order dismissing the complaint, as is alleged in the petition.

XI.

This respondent denies the allegations contained in Paragraph XI. of the petition.

XII.

Further answering, this respondent avers and contends that this Court has no jurisdiction of this suit, and no power or authority to set aside said order of dismissal, and that the petition is insufficient in law upon its face; and respondent asks that the same be dismissed without further hearing.

62 THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By W. F. DICKINSON, *Its Attorney.*

STATE OF ILLINOIS,
County of Cook, ss:

W. F. Dickinson, being first duly sworn, on oath deposes and says that he is General Attorney of The Chicago, Rock Island & Pacific Railway Company, respondent herein, and that the facts set forth in the foregoing answer are true, as he verily believes.

W. F. DICKINSON.

Subscribed and sworn to before me this 6th day of April, A. D. 1910.

[Seal John C. Scott, Notary Public, Cook County, Ill.]

JOHN C. SCOTT,
Notary Public in and for Cook County,
State of Illinois.

63 *Order Extending Time of United States to File Answer.*

Entered April 11, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
v.
THE UNITED STATES OF AMERICA et al.

On motion of counsel for the United States in open court made and the petitioner, by its counsel, consenting in open court, it is ordered that the time within which the United States shall file its answer to the petition be and the same is hereby extended until the further order of the court.

64 *Journal Entry.*

Proceedings of April 12, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES et al., Respondents.

No. 18.

RUSSE & BURGESS et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

No. 19.

J. W. THOMPSON LUMBER CO. et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

Said causes came on for hearing on the motions to dismiss the petitions, and the arguments of counsel were commenced, Mr. Esterline appearing in behalf of the United States, Mr. Farrell in behalf of the Interstate Commerce Commission and Messrs. W. A. Percy and George H. Warrington in behalf of the petitioners.

65 *Answer of Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*

Filed April 13, 1911.

In the United States Commerce Court.

No. (9).

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA; THE CINCINNATI, HAMILTON & Dayton Railway Company; The Baltimore & Ohio Southwestern Railroad Company; Norfolk & Western Railway Company; The Staten Island Rapid Transit Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Kansas City Southern Railway Company; Kansas City Terminal Railway Company; Chicago, Rock Island & Pacific Railway Company, Respondents.

Separate Answer of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to the Petition of the Procter & Gamble Company.

To the petition of the above named petitioner this defendant makes answer as follows:

I.

This defendant admits the allegations of Paragraph I. of the petition.

II.

In answer to Paragraph II. of the petition, this defendant admits that it is a corporation under the laws of Ohio and Indiana.

III.

In answer to Paragraph III. of the petition, this defendant admits that it is a common carrier engaged in the transportation of passengers and property, by continuous carriage or shipment, wholly by railroad, between points in the states of Ohio, Indiana
66 and Illinois, and as such is subject to the provisions of the Act to Regulate Commerce approved February 24th, 1887, and acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

IV.

In answer to Paragraph IV. of the petition, this defendant admits that the petitioner operates a manufacturing plant at Ivorydale, in the County of Hamilton, State of Ohio, within which it owns or controls approximately seven miles of private railroad tracks, which are located wholly on ground owned or controlled by it; that the said tracks are connected with the tracks of this defendant; that the petitioner is the owner of approximately five hundred and thirty-two private oil tank cars; that said cars are operated over the tracks of this defendant under the provisions of uniform published tariffs by which this defendant pays to the petitioner ¾ of one cent for each mile run by said cars over this defendant's tracks. This defendant admits that it has refused to furnish the petitioner with tank cars for use in its business. As to the other allegations of Paragraph IV. of the petition, this defendant has not sufficient knowledge or information to form any belief, and requests that so far as the same may be material the petitioner be required to make proof thereof.

V.

In answer to Paragraph V. of the petition, this defendant denies that while the said cars of the petitioner are held under lading on private tracks on property owned or controlled solely by the petitioner, they are not in railway service. This defendant admits that
67 it states in bills of lading that all cars and their contents upon delivery upon private tracks are held exclusively at the risk of the owner. As to the other allegations of Paragraph V. of the petition, this defendant has not sufficient knowledge or information to form any belief, and requests that so far as the same may be material the petitioner be required to make proof thereof.

VI.

In answer to Paragraph VI. of the petition, this defendant admits that on or about March 21st, 1910, it issued a tariff known as Circular No. F–75, publishing car demurrage rules applying on interstate traffic on its lines in the state of Ohio, effective April 22, 1910, which tariff has been duly filed with the Interstate Commerce Commission, designated as I. C. C. No. 5185, and that Rule I. of said car demurrage rules is substantially as set forth.

VII.

This defendant admits the allegations of Paragraph VII. of the petition, except the allegation that this defendant asserts the right to charge and collect demurrage charges on the petitioner's cars after they have been withdrawn from railroad service, which it denies.

VIII.

This defendant admits the allegations of Paragraphs VIII., IX. and X. of the petition, subject to verification from the record of the proceedings before the Interstate Commerce Commission.

IX.

This defendant denies the allegations of Paragraph XI. of the petition, except the allegation that this defendant is now exacting demurrage charges under the provisions of Rule I., and will
68 continue to do so, which it admits.

And this defendant is ready and willing to aver, maintain, and prove all these matters and things as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
By CLYDE BROWN, *Solicitor.*

Dated at New York, April 12, 1911.

Address of defendant's attorney: Clyde Brown, Grand Central Terminal, New York, N. Y.

69 *Stipulation.*

Filed April 13, 1911.

In the United States Commerce Court.

No. 9.

PROCTER & GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA et al.

Stipulation.

It is hereby stipulated and agreed that an extension of five days' time from date may be allowed the defendant, Kansas City Southern Railway Company, within which to file answer herein.

BLACKBURN ESTERLINE,
For the United States.
GEORGE W. WARRINGTON,
For Complainant.
EVANS BROWNE,
For Kansas City Southern Ry. Co.
P. J. FARRELL,
For Interstate Commerce Commission.

April 13, 1911.

70 *Journal Entry.*

Proceedings of April 13, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES et al., Respondents.

In said cause it was ordered: That the Kansas City Southern Railway Company be granted an extension of five days within which to file its answer; and that counsel for the Baltimore & Ohio Southwestern Railroad Company be given until April 15th to file brief.

71 *Journal Entry.*

Proceedings of April 13, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES et al., Respondents.

No. 18.

RUSSE & BURGESS et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

No. 19.

J. W. THOMPSON LUMBER Co. et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

Said causes came on for hearing on the motions to dismiss the petitions, and the arguments of counsel were continued, Mr. George H. Warrington appearing on behalf of the Petitioners, Hon. James A. Fowler on behalf of the United States and Messrs. Edward Barton and R. Walton Moore on behalf of the other respondents.

It was ordered: That Mr. R. Walton Moore be given ten days within which to file a brief on the subject of the general jurisdiction of the court.

72 *Journal Entry.*

Proceedings of April 14, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES et al., Respondents.

No. 18.

RUSSE & BURGESS et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

No. 19.

J. W. THOMPSON LUMBER COMPANY et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION et al., Respondents.

Said causes came on for hearing on the motions to dismiss the petitions, and the arguments of counsel were concluded; Hon. James A. Fowler appearing in behalf of the United States.

Upon request of counsel the United States was given ten days to file a brief and the petitioners were given ten days in which to reply.

73 *Order Overruling Motions to Dismiss.*

Entered April 14, 1911.

United States Commerce Court.

No. 9.

PROCTER & GAMBLE CO., Petitioner,
v.
UNITED STATES et al., Defendants,
and
INTERSTATE COMMERCE COMMISSION, Intervener.

Per Curiam:

Without announcing a final conclusion, and reserving the question for further consideration, the court overrules for the present the motions to dismiss, so far as the same are based upon the claim that the court is without jurisdiction, and directs that the case be heard upon the merits, on the 18th of May next.

74 *Answer of Kansas City Southern Railway Company.*

Filed April 15, 1911.

In the Commerce Court of the United States.

No. 9.

PROCTER & GAMBLE COMPANY, Complainant.
vs.
THE UNITED STATES OF AMERICA et al., Defendants.

Separate Answer of Defendant The Kansas City Southern Railway Company.

Now on this day comes The Kansas City Southern Railway Company and for its separate answer to the petition of the Procter and Gamble Company respectfully states:

1. This defendant admits the allegations in paragraph 1 of said petition.

2. This defendant admits the allegations in paragraph 2 of said petition.

3. This defendant admits the allegations in paragraph 3 of said petition.

4. This defendant admits that complainant owns and operates

or controls large manufacturing plants at Ivorydale in Ohio, Port Ivory on Staten Island and at Kansas City in the State of Kansas; that at Kansas City it owns two miles of private railroad tracks located wholly on ground owned or controlled by complainant, but as to whether it owns or controls approximately seven miles at Ivorydale and two miles at Port Ivory, this defendant is not sufficiently informed and therefore denies the same. This defendant admits that it has no right, title or interest of any kind in any of said private tracks or the ground upon which they are located and admits that complainant's tracks are connected with the various rail-
75 road companies' tracks as alleged in paragraph 4 of said petition. This defendant admits that it is necessary for complainant to employ a large number of oil tank cars for the transportation of cotton seed oil and like products and that it is impracticable to economically transport the same in ordinary freight cars; but this defendant denies that it has refused or neglected to furnish complainant with any tank cars for use in its business. As to whether complainant has been compelled to expend approximately $500,000.00 in the purchase of private tank cars or is now the owner of approximately 532 of such cars, this defendant is not sufficiently informed and therefore denies the same. This defendant admits that certain tank cars owned by complainant are operated over the tracks of this defendant and other railroad companies and admits that complainant receives three-fourths of one per-cent. for each mile run by said cars over said railroad companies' tracks; but this defendant denies that the amount so received by complainant is not sufficient to allow it a reasonable return on its investment in said cars.

5. This defendant has not sufficient information as to the truth or falsity of the allegations in paragraph 5 of said petition upon which to base a belief and therefore denies the same.

6. This defendant admits that on or about April 14th, 1910 it issued a certain tariff known as freight tariff of demurrage and storage charges applying to interstate traffic effective May 20th, 1910, which tariff was duly filed with the Interstate Commerce Commission, designated as I. C. C. 2774 but as to whether the other defendants have published and filed tariffs as alleged in paragraph 6 of
76 the petition of complainant herein, this defendant is not sufficiently informed to answer the allegations with reference thereto and therefore denies the same.

This defendant admits that rule I in its said tariff of demurrage and storage charges is correctly quoted in paragraph 6 of said petition but this defendant is not sufficiently informed as to whether said rules in said tariff are substantially the same as the rules in the tariffs published by the Cincinnati, Hamilton & Dayton Railroad Company and the other defendant companies referred to in said paragraph 6.

7. This defendant admits the allegations in paragraph 7 of said petition.

8. This defendant admits the allegations in paragraph 8 of said petition.

9. This defendant admits the allegations in paragraph 9 of said petition.

10. This defendant admits the allegations in paragraph 10 of said petition except as to the date when the report and order of the Commission in said proceeding were made public and came to the attention of complainant. As to said matters, this defendant is not sufficiently advised and therefore denies said allegations.

11. This defendant denies that the order of the Interstate Commerce Commission dismissing the complaint referred to in paragraph 11 of said petition is null or void or beyond its power or is unjust or unreasonable or that complainant's property is taken without compensation or without due process of law or that said rule is in violation of the act to regulate commerce.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By S. W. MOORE &
F. H. MOORE,
Its Attorneys.

405 Thayer Building, Kansas City, Missouri.

BRITTON AND GRAY,
Of Counsel.

77 *Stipulation and Record of Proceedings Before Interstate Commerce Commission.*

Filed May 13, 1911.

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

RECORD.

It is stipulated and agreed by all the parties to this proceeding that this cause may be heard by the Commerce Court upon the evidence produced before the Interstate Commerce Commission supplemented by a statement as to the amounts paid by the complainant to the defendant railway companies for demurrage charges on its tank cars

on private tracks from April 1, 1910, to April 1, 1911, and that the following is such evidence:

78 *Proceedings.*

The CHAIRMAN: Case No. 3208, The Procter & Gamble Company vs. The Cincinnati, Hamilton & Dayton Railway Company and others. Is that case ready?

Mr. WARRINGTON: The complainant is ready.

The CHAIRMAN: Who appears for the plaintiffs?

Mr. WARRINGTON: George H. Warrington.

The CHAIRMAN: Who appears for the defendants?

Mr. BARTON: Edward Barton for the Baltimore & Ohio Southwestern and the Staten Island Rapid Transit Railway.

Mr. MOORE: R. Walton Moore for the Norfolk & Western.

Mr. BROWNE: Evans Browne for the Kansas City Southern and the Kansas City Terminal Company.

Mr. SCOVILLE: May it please the Commission, as representing the Indian Refining Company, I would like to ask that that company be allowed to intervene in this case. I have prepared a petition and a motion of intervention. The facts of the case are almost identical with the case now before the Commission.

The CHAIRMAN: Is your petition of intervention in support of the complaint?

Mr. SCOVILLE: In support of the complaint, yes.

The CHAIRMAN: And contains substantially the same allegations?

Mr. SCOVILLE: Substantially, yes; the same facts in regard to car demurrage.

The CHAIRMAN: Where is the plant located in which your clients are interested?

79 Mr. SCOVILLE: Lawrenceville, Illinois, where they have a refining plant. They also own tank cars to which the same rule on demurrage applies.

The CHAIRMAN: Is there objection on the part of the defendants to this request?

Mr. BARTON: I have none. It is on the line of the Baltimore & Ohio Southwestern.

Mr. BROWNE: We have none.

Mr. WARRINGTON: If the facts alleged in his complaint are the same as those alleged in our petition, we have no objection; but if the cases are not similar then we have an objection to it.

The CHAIRMAN: The question is asked as to whether you desire to introduce any testimony.

Mr. SCOVILLE: No, we will not ask for that privilege. We simply would like to have the Indian Refining Company made a part of the complaint. I will not ask to present any testimony nor ask for the right to cross-examine witnesses in any way, as I do not want to interfere with the proceedings and bring out any new evidence.

Commissioner CLARK: You intervene and adopt the complaint of The Procter & Gamble Company?

Mr. SCOVILLE: No. I have a separate complaint. The facts, to a

certain extent, are different, but it is the same idea with regard to the same demurrage rules.

Commissioner HARLAN: You will stand on this record and simply discuss it from a legal standpoint; is that your idea?

Mr. SCOVILLE: Yes, sir.

The CHAIRMAN: The petition will be allowed so far as it is not inconsistent with the complaint in this case. It is under-
80 stood by the Commission that at the conclusion of any testimony which the parties may desire to offer, the case will be argued and submitted.

Mr. Warrington, do you desire to call any witnesses?

Mr. WARRINGTON: I think we will have to call a witness as to the formal proof. Most of the answers here admit the facts as stated in the petition, but one or two of the railroads deny them. There are eight defendants to this proceeding, and as the facts are denied in some instances, I suppose it will be necessary to offer some proof. It should not take but a short time to do that.

The CHAIRMAN: Very well. Call your witness.

Complainant's Testimony.

R. P. BUCHANAN was called as a witness by and on behalf of the complainant, and being first duly sworn, testified as follows:

Mr. WARRINGTON: Will you state your name, residence and occupation?

Mr. BUCHANAN: R. P. Buchanan; I am the manager of the freight department of The Procter & Gamble Company.

Mr. WARRINGTON: What is your residence?

Mr. BUCHANAN: Cincinnati, Ohio.

Mr. WARRINGTON: Where are the plants of The Procter & Gamble Company operated?

Mr. BUCHANAN: At Ivorydale, Ohio; Kansas City, Kansas, and Port Ivory, Staten Island, New York.

81 Mr. WARRINGTON: The Procter & Gamble Company is a corporation under the laws of Ohio, is it not?

Mr. BUCHANAN: Under the laws of Ohio.

Mr. WARRINGTON: What in a general way is the extent of the plant at Ivorydale?

Mr. BUCHANAN: It is an extremely large plant, one of the largest in this country. We have 7.3 miles of track upon our own property. We are very large shippers of soap, cotton seed oil and oils of various kinds.

The CHAIRMAN: Do you know how many acres, approximately, your plant consists of?

Mr. BUCHANAN: About one hundred.

Mr. WARRINGTON: That is the plant at Ivorydale?

Mr. BUCHANAN: Yes sir.

Mr. WARRINGTON: Tell the Commission where Ivorydale is.

Mr. BUCHANAN: Ivorydale is 7 miles from the City of Cincinnati, in Hamilton County, in what is called the Millcreek Valley. We are

served there by practically all of the lines north of the Ohio river that reach Cincinnati, the Big Four, C. H. & D., Norfolk & Western and Pennsylvania, and B. & O. S. W.

The CHAIRMAN: Do all of them have their main tracks near to the plant or have spur connections to them?

Mr. BUCHANAN: There are four of them that have direct connections with it—the B. & O. Southwestern, C. H. & D., Big Four and what is known as the Cincinnati Connecting Belt Road, operated in connection with the Norfolk & Western.

Commissioner HARLAN: Is the interchange track inside of your fence?

82 Mr. BUCHANAN: It is outside.

Mr. WARRINGTON: You say you have 7.3 miles of private track?

Mr. BUCHANAN: Yes, sir; all of which is located upon our own property.

Commissioner Clark: Do you have any switching engines?

Mr. BUCHANAN: We perform our own switching service. We operate three switching locomotives at Ivorydale.

Commissioner CLARK: Do you take these cars from the interchange track outside of your plant?

Mr. BUCHANAN: Outside of the plant, except in case of the Baltimore & Ohio Southwestern. A certain part of that is on our property.

Mr. WARRINGTON: How far outside of your plant is this interchange track located?

Mr. BUCHANAN: It varies with the different roads. I should say that with the C. H. & D. and one yard of the Big Four, the Norfolk & Western and Pennsylvania, they are only about a few hundred yards outside of the north end of our property line. We operate two tracks with the Big Four, one north and one practically east. In connection with the B. & O. S. W., the interchange tracks there are practically on our ground, part of them are not.

Commissioner HARLAN: Who owns the right of way to the main line of the defendant properties?

Mr. BUCHANAN: The roads own their own right of way up to our own property line. We do not operate or own anything outside of our own property line.

Mr. WARRINGTON: Do the railroads own or operate anything inside of your own property line?

83 Mr. BUCHANAN: No, sir.

Mr. WARRINGTON: Are the tracks between the interchange tracks and your property line ever used for storage of cars?

Mr. BUCHANAN: I did not understand your question.

Mr. WARRINGTON: The tracks between the interchange tracks and your property line are used for what?

Mr. BUCHANAN: As a connecting track.

Mr. WARRINGTON: Are they used at all for the storage of cars?

Mr. BUCHANAN: Not between our property in the yard or storage tracks. Those are the main leads; they could not be; they would have to be kept clear. But we receive and deliver all of our inbound and outbound business on designated interchange tracks.

Mr. WARRINGTON: And your own locomotives take the freight from the interchange tracks?

Mr. BUCHANAN: Yes, and we operate under an agreement with the railroads on those interchange tracks; and place or receive those cars on those tracks.

Commissioner CLARK: Do you receive any compensation or allowance or pay of any kind for switching?

Mr. BUCHANAN: Not The Procter & Gamble Company; no, sir. The Ivorydale and Mill Creek Valley Railway does.

Commissioner CLARK: Is that the company that does the switching inside of your works?

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK: Does The Procter & Gamble Company own that railroad?

84 Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: Has The Ivorydale & Millcreek Valley Railway Company filed tariffs, here with the Commission?

Mr. BUCHANAN: They have filed tariffs with the Interstate Commerce Commission and also with the Ohio State Commission.

Commissioner HARLAN: What is the capital of that company?

Mr. BUCHANAN: $100,000.

Commissioner HARLAN: How many engines does it own?

Mr. BUCHANAN: Three engines.

Commissioner HARLAN: How many cars?

Mr. BUCHANAN: About 35 or 40 that are never used except within our own enclosure.

Commissioner HARLAN: Do you know the gross amount of the allowance received last year from the various defendants?

Mr. BUCHANAN: Only approximately. Our report is with the Commission, however.

Commissioner HARLAN: What does it approximate?

Mr. BUCHANAN: My recollection is about $70,000.

Commissioner CLEMENTS: What is the basis; what is the division?

Mr. BUCHANAN: We receive an arbitrary of $3.50 for each loaded car in and each loaded car out.

Commissioner CLEMENTS: And in regard to all of these interchange tracks it is the same from all of the roads?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: Do your tracks connect the tracks of the C. H. & D. Railway Company on one side of your land, with

85 the tracks of the B. & O. S. W. and Big Four on the other side?

Mr. BUCHANAN: Our tracks can be used as detour tracks or interchange tracks with practically all of those roads through our plant.

The CHAIRMAN: Are they so used?

Mr. BUCHANAN: Infrequently, Your Honor. Sometimes a bridge is out or some wash-out occurs and they want to detour their trains. They have used them in the past, but infrequently.

The CHAIRMAN: But not in the ordinary course of business?

Mr. BUCHANAN: No, sir.

The CHAIRMAN: Do you allow the locomotives of these defendants to go through your yard?

Mr. BUCHANAN: No, sir.

The CHAIRMAN: That is not allowed?

Mr. BUCHANAN: No, sir.

Commissioner CLARK: Who charges this demurrage that you complain about?

Mr. BUCHANAN: All of the roads that deliver, the four roads that deliver directly to us: the B. & O. S. W., the Big Four, the C. H. & D., the Cincinnati Connecting Belt, which is really operated by the Norfolk & Western. The Norfolk & Western, if you use that as the road operating, would also charge us demurrage on any business to or from the Pennsylvania Road.

Commissioner CLARK: Against whom is this demurrage charged?

Mr. BUCHANAN: The Procter & Gamble Company.

Commissioner CLARK: How does it come the B. & O. S. W. having turned traffic over to this other railroad—I have forgotten the name of it.

86 Mr. BUCHANAN: The Ivorydale & Millereek Valley.

Commissioner CLARK: Having turned the traffic over to The Ivorydale & Millereek Valley, may assess demurrage against The Procter & Gamble Company?

Mr. BUCHANAN: At one time they did pay us a per diem and The Ivorydale & Millereek Valley roads assessed demurrage under the rule against The Procter & Gamble Company. There was a good deal of question. The roads objected to The Procter & Gamble Company not paying demurrage to them, and we agreed to do it and have been doing it for some three years, after we went out of the per diem.

Commissioner HARLAN: When you say "we agreed," do you mean The Procter & Gamble Company arranged that basis with the defendants, over the head of the Ivorydale Company?

Mr. BUCHANAN: I was acting for both companies.

Commissioner HARLAN: Are you an officer of The Ivorydale & Millereek Valley Railroad Company?

Mr. BUCHANAN: I am president and general manager of The Ivorydale & Millereek Valley Road.

Commissioner HARLAN: Has that company moved freight for any one else than The Procter & Gamble Company?

Mr. BUCHANAN: Practically none.

Commissioner HARLAN: Are there any other industries on its line?

Mr. BUCHANAN: No, sir.

Commissioner HARLAN: It does not carry passengers?

Mr. BUCHANAN: No, sir.

Commissioner HARLAN: Or mail and express?

87 Mr. BUCHANAN: It absolutely performs a switching service.

Commissioner HARLAN: May I ask how long the Ivorydale Company has been in existence?

Mr. BUCHANAN: I think they were incorporated about 1885 or 1886; about that time.

Commissioner HARLAN: Had these tracks inside of the plant been built before that incorporation?

Mr. BUCHANAN: As the buildings were erected they were built to serve the construction of the plant. For several years one road performed all the service for us without charge. That got to be burdensome on them, and as the other roads came in and started a track connection, it was suggested that The Ivorydale & Millcreek Valley purchase our own power and do our own switching for a terminal allowance, which was done.

Commissioner HARLAN: That is not quite the question that I asked. What I want to know is whether The Procter & Gamble Company, as such, owned and for itself operated this switch track before the organization of the Ivorydale Company.

Mr. BUCHANAN: I can not answer that definitely; but I think not.

Commissioner HARLAN: And before those tracks were built they did the teaming between their plant, I suppose, and the stations of the defendant companies?

Mr. BUCHANAN: No, sir.

The CHAIRMAN: The Procter & Gamble Company was originally in Cincinnati?

Mr. BUCHANAN: Yes, sir; and moved out subsequently.

88 The CHAIRMAN: In connection with that, this Ivorydale Railroad was organized?

Mr. BUCHANAN: Yes, sir.

Commissioner CLEMENTS: When was it incorporated as a railroad?

Mr. BUCHANAN: I cannot answer that except approximately. It was somewhere around within a year or two prior to 1890.

Mr. WARRINGTON: I may state Procter & Gamble as a firm, before it was incorporated, built at Ivorydale about 1885. The Ivorydale & Millcreek Valley Railway Company was incorporated about that time. The Procter & Gamble Company was incorporated itself in 1890. The Ivorydale & Millcreek Valley leased these tracks from The Procter & Gamble Company which only built them for its use and owns the ground on which they are. The Procter & Gamble Company owns the stock of The Ivorydale & Millcreek Valley Company.

Commissioner CLARK: Suppose a Cincinnati, Hamilton & Dayton Railway car is delivered to your railroad by the C. H. & D. What demurrage rule applies to it, and against whom is demurrage charged if any accrues?

Mr. BUCHANAN: The usual rules of the C. H. & D. would apply, and it would be charged against Procter & Gamble.

Commissioner CLARK: That is, these railroads that deliver to the Ivorydale Railroad——

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK (continuing): Assess demurrage?

Mr. BUCHANAN: Yes, sir.

89 Commissioner CLARK: For cars that are entirely off their rails?

Mr. BUCHANAN: Yes, sir. After they deliver the car on to the interchange track, demurrage against The Procter & Gamble Company begins. The railroads until quite recently have had a joint representative of the Car Service Bureau who kept all those records for the railroads.

The CHAIRMAN: I infer, then, that The Ivorydale & Millcreek Valley Railway Company is treated by these defendant roads as a plant facility of The Procter & Gamble Company, and delivery of cars to the tracks of that switching road is regarded as a delivery to Procter & Gamble.

Mr. BUCHANAN: Substantially so.

Commissioner CLEMENTS: I suppose the cars and engines and crews of The Ivorydale & Millcreek Railway, after the Millcreek Company takes them in, some go to one portion of the plant and some to another; they are first sent to one place, and then when the product is in a better state of development and manufacture, the cars take it around to another, and so on around about through the whole process of manufacture.

Mr. BUCHANAN: That is correct.

Commissioner HARLAN: As I understood your testimony, you are the Freight Traffic Manager of The Procter & Gamble Company?

Mr. BUCHANAN: Practically so. The title is Manager of the Freight Department.

Commissioner HARLAN: You are also the President of the Ivorydale Railway Company?

Mr. BUCHANAN: Yes, sir.

90 Commissioner HARLAN: Does the latter company run an expense account of its own?

Mr. BUCHANAN: We keep our separate accounts; yes, sir.

Commissioner HARLAN: Do you receive a salary from that company?

Mr. BUCHANAN: Yes, sir.

Commissioner HARLAN: And are carried on the books of that company?

Mr. BUCHANAN: Yes, sir.

Commissioner HARLAN: Is that a nominal or substantial salary?

Mr. BUCHANAN: For the work I perform for it, I should say it was substantial.

Mr. WARRINGTON: Taking the situation at Port Ivory, Staten Island, will you describe to the Commission, as to the extent of the plant, the tracks owned there and the switching facilities?

Mr. BUCHANAN: We own down there some seventy odd acres of land, of which at the present time perhaps half is occupied with our buildings and facilities. That is owned and operated by The Procter & Gamble Company. It has no incorporated road there. We get no terminal allowance of any kind for performing a switching service. Substantially we do the same thing there without compensation as we do at Ivorydale. We have 3.7 miles of road.

Mr. WARRINGTON: How many locomotives?

Mr. BUCHANAN: One locomotive. We connect only with the Staten Island Rapid Transit Railway. That is the only rail connection we have. We have our own dock facilities where the lighters and floats of all the roads in New York reach us.

91 Mr. WARRINGTON: And where is the interchange track there?

Mr. BUCHANAN: The interchange track there is—with respect to business, do you mean?

Mr. WARRINGTON: With reference to your property.

Mr. BUCHANAN: It is about a quarter of a mile from the end of our property line.

Mr. WARRINGTON: The locomotives of the railroad company do not enter your ground?

Mr. BUCHANAN: No; we deliver and receive from designated interchange tracks.

Commissioner HARLAN: You mean you do not allow them to enter your ground?

Mr. BUCHANAN: No, sir.

Commissioner CLARK: Is there an allowance there for switching?

Mr. BUCHANAN: No, sir.

Mr. WARRINGTON: What about the situation at Kansas City?

Mr. BUCHANAN: In Kansas City we own from 25 to 30 acres and have a little less than 2 miles of track. We have connection there with the Kansas City Southern, the Connecting Belt Railroad and the Rock Island. Under a recent agreement the Rock Island performs all the switching (delivers and receives) as a joint agent for the other two roads. We have no engines and receive no terminal allowance there.

Mr. WARRINGTON: Did you state how many miles of track you owned there?

Mr. BUCHANAN: Yes, sir.

The CHAIRMAN: He said about 2 miles.

Mr. WARRINGTON: And that is located where?

Mr. BUCHANAN: On our own property.

92 Mr. WARRINGTON: How many private cars, approximately, does The Procter & Gamble Company own?

Mr. BUCHANAN: At this present time?

Mr. WARRINGTON: Yes.

Mr. BUCHANAN: 532.

Mr. WARRINGTON: At the date of the filing of this petition, about how many did it own?

Mr. BUCHANAN: 432.

Mr. WARRINGTON: It has purchased a hundred cars since that time?

Mr. BUCHANAN: Yes.

Mr. WARRINGTON: What kind of cars are these?

Mr. BUCHANAN: They are tank cars.

Mr. WARRINGTON: The ordinary type of tank cars?

Mr. BUCHANAN: Some of them are. Quite a proportion of them are still wooden underframe cars; a majority of them are steel underframe tank cars.

Mr. WARRINGTON: What are those cars used for?

Mr. BUCHANAN: In the transportation of oil, greases, tallows, silicate, and occasionally the other things that it is feasible to transport in tank cars—principally cotton seed oil.

Mr. WARRINGTON: Chiefly cotton seed oil?

Mr. BUCHANAN: Yes.

The CHAIRMAN: Are they used mainly or exclusively for bringing materials into the plant?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: They are used more for bringing materials in than shipping materials from all of those plants?

Mr. BUCHANAN: Yes. The material in would predominate.

93 The CHAIRMAN: What do you ship out in tank cars?

Mr. BUCHANAN: In the case of the cotton seed oil we get the crude cotton seed oil and ship out the refined, and its products. That is practically all that we ship out, except some silicate. We ship silicate in tank cars; but the chief outbound shipment is refined cotton seed oil.

Commissioner CLEMENTS: Is one of the businesses of The Procter & Gamble Company to refine oil and sell it as refined?

Mr. BUCHANAN: Yes, sir; not only at Ivorydale but at Kansas City and New York.

Mr. WARRINGTON: It is engaged very largely in that business?

Mr. BUCHANAN: Very largely indeed.

Commissioner CLARK: Upon what terms are those 500 and odd cars used by the railroad company?

Mr. BUCHANAN: Under their tariff agreement to pay a mileage on them. They allow us three-quarters of a cent per mile, empty and loaded, provided that the empty car comes back over the same route that the loaded car went, or that we equalize in some way the empties with the loaded mileage.

The CHAIRMAN: You have no box cars?

Mr. BUCHANAN: None that go into road service.

Mr. WARRINGTON: What box cars have you and for what are they used?

Mr. BUCHANAN: They are used exclusively for interfactory service on our own property.

Mr. WARRINGTON: They do not go into railroad service at all?

Mr. BUCHANAN: Not at all.

94 Mr. WARRINGTON: Can you state approximately to the Commission the cost to the company of these tank cars?

Mr. BUCHANAN: You want the first cost now?

Mr. WARRINGTON: Practically the first cost; an approximate estimate.

Mr. BUCHANAN: That would be, I should say, somewhere in the neighborhood of over $300,000.

Commissioner COCKRELL: How much a car?

Mr. BUCHANAN: It varies so, it is pretty hard to say what the average has been. I could figure that up.

Commissioner CLARK: What is the cost of the last class of cars you bought?

Mr. BUCHANAN: $1,135.

Mr. WARRINGTON: You bought 100 since the filing of the petition in this case at $1,135 apiece?

Mr. BUCHANAN: Yes, sir.

Commissioner CLEMENTS: These are with steel underframes?

Mr. BUCHANAN: With steel underframes.

Mr. WARRINGTON: How many steel underframes have you, out of these 532, about?

Mr. BUCHANAN: There are 135 that have the wooden underframes.

Mr. WARRINGTON: 135 out of the 532 are wooden underframes?

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK: These last ones bought were new cars?

Mr. BUCHANAN: Yes, sir; new cars.

Mr. WARRINGTON: Where were they made?

Mr. BUCHANAN: By the American Car Foundry Company.

95 Commissioner CLEMENTS: Are they or not of greater capacity than the older cars?

Mr. BUCHANAN: They are 8,000. They are not any greater than several other types of cars we have. We have quite a number eight thousand-gallon cars. Commercially an 8,000-gallon car is better fitted for our needs. We have some a little larger, a few of 10,000.

Mr. WARRINGTON: Under what arrangement are these cars operated over the different railroads?

Mr. BUCHANAN: An arrangement by which the roads pay us three-quarters of a cent per mile, loaded and empty, for the cars we deliver to them.

Mr. WARRINGTON: That is provided in the Official Classification?

Mr. BUCHANAN: Yes, sir, and also in the tariffs of some of the roads.

Mr. WARRINGTON: Can you give the reference to those tariffs? I understand it will not be necessary for us to formally introduce these various tariffs in evidence.

The CHAIRMAN: It is not necessary, but any tariff which you desire us to consider, should be brought to our attention so that they will not be overlooked.

Mr. BUCHANAN: You want me to read just the extract covering that particular place?

Mr. WARRINGTON: I think I can offer it here.

"Rule 29. (SEC. 1.) In providing rating in this classification for articles in tank cars, the carriers whose tariffs are governed by this Classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters (¾) of

96 one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

"(SEC. 2.) Private tank cars will be moved empty without charge, at the time movement is made between stations or junction points on

the lines of carriers whose tariffs are governed by this Classification (either individually or jointly), including delivery to connecting lines, subject to the following conditions:

"(*a*) Should the aggregate empty mileage of any owner's cars on June 30th of each year, or at the close of any such yearly period as may be mutually agreed upon, exceed the aggregate loaded mileage on the lines of such carriers individually (or jointly when mileage accounts are computed jointly), such excess must be paid for by the owner, either by an equivalent loaded mileage during the succeeding six months, or, at tariff rates, plus the mileage that has been paid by the carriers to the owners on such excess empty mileage. Any excess of loaded mileage over empty mileage of any owner's cars at the end of the accounting period will be continued as a credit against the empty movement of such cars for the ensuing twelve months.

"(*b*) Private tank car owners must assume responsibility for any excess empty mileage resulting from improper delivery of the cars by connecting lines.

"(*c*) New cars or newly acquired cars, moved empty to home or loading point by order of the owner, must be billed at regular tariff rates."

Now, that is contained in the Official Classification. Is that the arrangement under which your cars are carried?

97 Mr. BUCHANAN: It is also substantially the rule of the Western Classification. That is the rule under which our cars are operated by the railroads.

Mr. WARRINGTON: Is there any other arrangement or agreement whatever between your company and the railroad providing for the operation of tank cars than is stated in this Official Classification and in published tariffs of the roads?

Mr. BUCHANAN: None whatever.

Mr. WARRINGTON: And substantially you receive three-fourths of one cent per mile for these cars?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: And no other payment whatever.

Mr. BUCHANAN: No other payment.

Mr. WARRINGTON: If the Commission please, certain of the roads have, in addition to that, filed their tariffs covering the movement of private tank cars. They are all on file with this Commission and I do not know that it is necessary to offer them in evidence. I have here the tariffs of the C. H. & D. Railway Company, the Big Four, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway.

The CHAIRMAN: Perhaps a copy of those might be filed with the stenographer in connection with Mr. Buchanan's testimony. Can you give convenient references from the tariffs?

Mr. WARRINGTON: Here are the copies, which I will file with the stenographer.

(The papers referred to, thus offered in evidence, were marked "Complainant's Exhibit No. 1" and are forwarded herewith attached hereto.)

Mr. WARRINGTON: The railroads pay no per diem or railroad charges whatever for these cars, do they?

98 Mr. BUCHANAN: No, sir.

Mr. WARRINGTON: When did these charges begin to accrue, of three-fourths of a cent per mile?

Mr. BUCHANAN: They begin to accrue as soon as the car starts to move.

Mr. WARRINGTON: When do they end?

Mr. BUCHANAN: When the car stops.

The CHAIRMAN: The distance is computed from the interchange tracks?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: You are paid on that distance?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: You receive no allowances or payments of any kind under the tariffs for these cars while standing in your yard, do you?

Mr. BUCHANAN: No, sir.

Mr. WARRINGTON: Have you any figures that would show to the Commission approximately the receipts derived by The Procter & Gamble Company during the past year from the railroads for the use of these tank cars?

Mr. BUCHANAN: The mileage earned?

Mr. WARRINGTON: Yes.

Mr. BUCHANAN: Yes, sir. We earned for the fiscal year ended June 30th, 1910, from mileage, $30,701.17.

Commissioner CLARK: On how many cars?

Mr. BUCHANAN: 432.

Mr. WARRINGTON: These other hundred cars have not been figured in with those figures. That is approximately $50,000. Have you computed the operating expenses on these cars?

Mr. BUCHANAN: Yes, sir.

99 Mr. WARRINGTON: Will you state to the Commission approximately what they are, by items?

Mr. BUCHANAN: There is first an item of insurance, of $297.88; inspection, $440.17; taxes, corporation taxes, $1,078.81; miscellaneous state taxes, $43.90; general expenses, $1,690; repairs, $22,262.69. We have figured in depreciation for that year under M. C. B. rules, $15,790.58.

Commissioner COCKRELL: What is the aggregate?

Mr. BUCHANAN: The aggregate is $39,931.57.

Mr. WARRINGTON: That is including the depreciation figured according to M. C. B. rules?

Mr. BUCHANAN: Yes, sir. That provides for 6 per cent. on wooden underframe cars and 5 per cent. on steel underframe cars.

Mr. WARRINGTON: Does that show a gain or a loss for the year?

Mr. BUCHANAN: As we have it figured, figured from the time we bought the cars, and also figuring in certain heavy expenses we were under in steel-underframing a number of cars, it figures for that fiscal year a deficit of $3,846.55.

Commissioner CLEMENTS: Are those cars repaired by your company or by the railroad company, or by both?

Mr. BUCHANAN: By both. Any actual wear and tear they charge against us. Anything involving rough handling or negligence on their part, they pay for, or they allow us to repair them and pay for the repairs under M. C. B. rules.

Mr. WARRINGTON: But for ordinary wear and tear on the cars, your company stands that?

Mr. BUCHANAN: Yes, sir.

100 Commissioner HARLAN: If the car is destroyed on the lines of one of the defendants, or any other railroad, they replace it?

Mr. BUCHANAN: Yes, sir; under M. C. B. rules again they bring in this depreciation.

Mr. WARRINGTON: They depreciate according to a table of values figured on Master Car Builders' rules?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: Depending on the age and construction of the car?

Mr. BUCHANAN: They figure 6 per cent. a year on the original value of the car.

Mr. WARRINGTON: Who pays the taxes on these cars?

Mr. BUCHANAN: The Procter & Gamble Company.

Mr. WARRINGTON: Have the railroads any title of ownership or interest whatever in these cars or any of them?

Mr. BUCHANAN: None whatever.

Mr. WARRINGTON: They are owned exclusively by The Procter & Gamble Company?

Mr. BUCHANAN: Absolutely.

Mr. WARRINGTON: When these cars are brought to your various plants, loaded, are they taken at once from the interchange tracks into the plants?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: They are then on private property, on your private ground?

Mr. BUCHANAN: On private property; on private tracks, on private property.

Mr. WARRINGTON: And they remain there until they are loaded and tendered for shipment again to the railroads on the interchange tracks?

101 Mr. BUCHANAN: Either loaded for shipment or empty to go for a load.

Mr. WARRINGTON: And at that time you take them from the interchange tracks and they are taken away?

Mr. BUCHANAN: Yes, sir; we deliver to the interchange track of our connections.

Commissioner CLARK: How much free time is allowed under the demurrage rule applied to these cars?

Mr. BUCHANAN: 48 hours.

Commissioner CLARK: From the time they are set on the interchange track?

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK: Until they are returned to the interchange tracks?

Mr. BUCHANAN: Yes, sir. Well, the demurrage under the old rules on outbound business at one of our plants commences from the time they are set for loading for outbound movement.

Commissioner CLARK: I am inquiring with reference to your Ivorydale plant.

Mr. BUCHANAN: Demurrage accrues from the time the inbound load is set on the interchange track.

Commissioner CLARK: How long does it continue?

Mr. BUCHANAN: 48 hours is the free time.

Commissioner CLARK: How long is that car subject to demurrage?

Mr. BUCHANAN: Until unloaded.

Mr. WARRINGTON: But it is not subject to demurrage or any other charge after it is unloaded and until it is returned to the interchange tracks?

Mr. BUCHANAN: That is right.

Mr. WARRINGTON: That is all I care to ask.

102 The CHAIRMAN: When does the demurrage accrue on the outbound cars; at the time they are set for loading?

Mr. BUCHANAN: If we do not give them shipping reference within that time.

The CHAIRMAN: I do not understand you.

Mr. BUCHANAN: When we put an empty on the interchange track we have to give them shipping instructions as to the destination, the consignee of the car, and the demurrage accrues.

Commissioner CLARK: How about the outbound load?

Mr. BUCHANAN: The outbound loads would be the same thing. We have to give movement shipping directions.

Commissioner COCKRELL: There is no demurrage on outbound loads until after they are set?

Mr. BUCHANAN: On outbound loads there would be no demurrage on that, provided we gave them shipping instructions in 48 hours.

Commissioner CLARK: On outbound cars, whether loaded or empty, there is no demurrage except when you neglect to give shipping instructions after placing them on the interchange tracks?

Mr. BUCHANAN: Yes, sir.

Commissioner COCKRELL: After you have taken the cars in, are any cars put back on the track?

Mr. BUCHANAN: Yes, sir.

Commissioner COCKRELL: What are they used for?

Mr. BUCHANAN: After they come in under load?

Commissioner COCKRELL: Yes.

Mr. BUCHANAN: They are used to ship out empty to get the raw material, or we hold them for storage if it is not convenient

103 for us to unload them. We store the material in the tank cars until such time as we can unload them.

Commissioner COCKRELL: Are these cars used by the railroad for any other company or any other shipper than yourselves?

Mr. BUCHANAN: Absolutely not; unless as it happens sometimes they confiscate them for their water service.

The CHAIRMAN: Mr. Buchanan, if I understand what happens, it is this: One of your tank cars is brought in loaded and left upon the interchange tracks. Free time begins to run. You take that car in your plant. If it is unloaded before the expiration of 48 hours, then there is no demurrage?

Mr. BUCHANAN: That is right.

The CHAIRMAN: No matter how long it may remain in the plant?

Mr. BUCHANAN: After unloading?

The CHAIRMAN: Yes.

Mr. BUCHANAN: That is right.

The CHAIRMAN: And no demurrage accrues outbound either loaded or empty until the cars are placed by you on the interchange tracks.

Mr. BUCHANAN: On the interchange tracks.

The CHAIRMAN: Provided you give shipping directions.

Mr. WARRINGTON: Movement shipping instructions.

The CHAIRMAN: Suppose you do not?

Mr. BUCHANAN: As I understand it, it then accrues after 48 hours.

The CHAIRMAN: After 48 hours from the time it was delivered to you?

104 Mr. BUCHANAN: At the time we delivered it to the interchange tracks.

Mr. WARRINGTON: That is, it is on the railroad track?

Mr. BUCHANAN: On railroad property.

Mr. WARRINGTON: Demurrage accrues when it is on the railroad tracks?

Mr. BUCHANAN: That is my understanding of it.

Mr. WARRINGTON: Now, I believe Commissioner Cockrell asked you whether these cars are owned and used exclusively by The Procter & Gamble Company.

Mr. BUCHANAN: They are.

Mr. WARRINGTON: They are not used by other companies or by the railroads, are they?

Mr. BUCHANAN: Not at all.

Mr. WARRINGTON: Have the railroads any right to say when these cars shall be offered by this company, tendered for service of the railroad?

Mr. BUCHANAN: Absolutely not.

Mr. WARRINGTON: Is that exclusively in The Procter & Gamble Company?

Mr. BUCHANAN: That is absolutely with The Procter & Gamble Company—if they are empty to load them out; or keep them an indefinite time provided they set on their own tracks.

Mr. WARRINGTON: Is The Procter & Gamble Company responsible in any way to the railroads for damage to these cars or otherwise during the time the cars are on the private tracks of The Procter & Gamble Company?

Mr. BUCHANAN: Will you state that again?

Mr. WARRINGTON: I say, is The Procter & Gamble Company re-

-sponsible to the railroads for the condition of these cars, for
105 damages to them, or in any other way, during the time they are on the tracks of The Procter & Gamble Company?

Mr. Buchanan: No, sir; absolutely not.

Mr. Warrington: They are not at all?

Mr. Buchanan: No, sir.

Mr. Warrington: The railroads have no responsibility for these cars while they are on your tracks; have they?

Mr. Buchanan: None whatever.

Mr. Warrington: That is all I care to ask Mr. Buchanan.

Commissioner Clements: You say the road could not use these cars for other freight than Procter & Gamble freight. Is that by reason of contract or stipulation to that effect? Suppose one of your cars starts out empty for a load of cotton seed oil to be gotten in the south; and the railroads could load it with something and take it down there. Would they have the right to do it?

Mr. Buchanan: They certainly would not; they have not done it.

Commissioner Clements: They do not, in fact, do it?

Mr. Buchanan: Aside from confiscation for water service. Then occasionally some car of private ownership loaded also with cotton seed oil, maybe, will get into a wreck and they might ask us if we could not furnish one of our cars to transfer that load. We frequently do that. That is not infrequent.

Commissioner Clements: That would be a special case?

Mr. Buchanan: Yes, sir.

106 Commissioner Clements: You say they are not permitted under the arrangement to use them?

Mr. Buchanan: No, sir.

Commissioner Clements: Even though they might be returned empty to the point where you want to get the oil?

Mr. Buchanan: I have never known them to do that.

Commissioner Clements: It may not have much bearing on this case, but I would like to know where you get, for the most part, your crude cotton seed oil.

Mr. Buchanan: In the Southern States, running from Texas clean through to the Carolinas.

Commissioner Clements: Arkansas and Oklahoma?

Mr. Buchanan: Arkansas, Oklahoma, Mississippi, Alabama, Georgia and the Carolinas; also some in Louisiana.

Commissioner Clements: When you want loads you put your empty cars into the hands of the railroad to send for it?

Mr. Buchanan: To go to some point of destination for a load.

Commissioner Clements: And you go clear across the whole southern cotton-producing territory?

Mr. Buchanan: Yes, sir; that is, supplying all three of our factories.

Commissioner Clements: I am speaking now about your Ivorydale plant.

Mr. Buchanan: Ivorydale, except infrequently, would not go to any point west of the Mississippi River; that would go to the Kansas City plant. Nor do we go frequently to the Caro-
107 linas to bring oil to Ivorydale; that would go to the New York plant. The states from which we supply Ivorydale

are Georgia, Alabama, Mississippi, Louisiana and Tennessee.

Commissioner CLEMENTS: I suppose the rate adjustment would make it naturally come from those respective territories to the respective plants?

Mr. BUCHANAN: Yes, that is right.

Mr. WARRINGTON: Is there any other way to ship oil and greases than in tank cars?

Mr. BUCHANAN: In barrels.

Mr. WARRINGTON: They can be shipped in barrels?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: Is there any difference in rates between carload shipping in barrels and tank cars?

Mr. BUCHANAN: None whatever.

Mr. WARRINGTON: They are the same?

Mr. BUCHANAN: Yes, sir.

Mr. WARRINGTON: Tank cars are much more convenient than barrels, are they not?

Mr. BUCHANAN: For most users of those commodities, very much.

Commissioner CLARK: You mean more convenient for you, or for the railroads?

Mr. BUCHANAN: I would say for both. They are less liable to damage, leakage, for the railroads, and more convenient for large users of the material.

Mr. WARRINGTON: The use of tank cars has grown very materially for shipping such commodities in the past few years?

Mr. BUCHANAN: Very much.

Mr. WARRINGTON: Very largely superseding barrel shipments?

Mr. BUCHANAN: To quite an extent.

108 Mr. WARRINGTON: Just one more question. I believe you have said that the railroads only pay while these cars are actually engaged in carrying this material on their tracks.

Mr. BUCHANAN: The number of miles actually run.

Commissioner CLARK: He said they pay when they are empty, too.

Mr. BUCHANAN: Oh, yes.

Mr. WARRINGTON: That is in accordance with the tariff.

Commissioner CLARK: Your question said when actually engaged in carrying material.

Mr. WARRINGTON: Well, when they are on the railroad.

Mr. BUCHANAN: Either loaded or empty.

Mr. WARRINGTON: And the railroads never have undertaken to exercise the right, and do not exercise the right, to order these cars out into railroad service at all at any time, do they?

Mr. BUCHANAN: Absolutely not.

Mr. WARRINGTON: That is all.

The CHAIRMAN: Do counsel for carriers desire to cross-examine?

Mr. MOORE: I do not think I have any questions.

Commissioner HARLAN: I would like to put one other question, about this allowance of $3.50 on inbound and outbound loaded cars. That is paid by the defendants to the Ivorydale Railway Company?

Mr. BUCHANAN: Yes, sir.

Commissioner HARLAN: What do you understand to be the service that the company performs for that allowance?

109 Mr. BUCHANAN: There is the taking of the cars, either loaded or empty, from between the interchange tracks and the designated part of the plant of Procter & Gamble, which is a service they would otherwise perform themselves.

Mr. BROWN: I would like to ask one question.

Commissioner CLEMENTS: Before you do that, you say the service they would otherwise perform. You mean that the railroads would perform?

Mr. BUCHANAN: Yes, sir.

Commissioner CLEMENTS: Would they perform the service of taking these loads of raw material into the plant?

Mr. BUCHANAN: They do at Kansas City, for us, and at numberless places for other industries.

Commissioner CLEMENTS: Well, could they operate at Ivorydale and do that, and you have your manufacturing plant cars operate in there at the same time?

Mr. BUCHANAN: That might be difficult.

Mr. BROWN: Will you tell me whether you are operating at Kansas City with the Kansas City Southern Railway under the average agreement, in Rule 9?

Mr. BUCHANAN: Yes, sir; that is my understanding.

Mr. BROWN: That gives you more or less credit?

Mr. BUCHANAN: It does.

Mr. BROWN: From month to month?

Mr. BUCHANAN: It does.

Commissioner CLARK: Does that average agreement also apply to Ivorydale?

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK: And at Staten Island?

110 Mr. BUCHANAN: At Staten Island, yes, sir.

The CHAIRMAN: If there are no further questions, Mr. Buchanan is excused.

The CHAIRMAN: Are there any further witnesses?

Mr. WARRINGTON: I have one other witness. But before coming to him I have tariffs containing these demurrage rules which are referred to by the bill of complaint by number and date. I will offer those in evidence, if it is in accordance with the rules. I have the original tariffs here, of all of these defendant railroad companies. I will now offer them in evidence.

The CHAIRMAN: Very well.

(The tariffs referred to, thus offered in evidence, were marked "Complainant's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8 and 9," respectively, and are forwarded herewith, attached hereto.)

A. E. ANDERSON, produced as a witness by and on behalf of the complainant, being duly sworn testified as follows:

Mr. WARRINGTON: State your full name, residence and occupation.

Mr. ANDERSON: A. E. Anderson. I am the General Superintendent of The Procter & Gamble Company.

Mr. WARRINGTON: Where do you reside?

Mr. ANDERSON: At Cincinnati.

Mr. WARRINGTON: You have heard Mr. Buchanan's testimony about these tank cars. What is the season when your tank car movement in your business is the heavier?

111 Mr. ANDERSON: Our tank cars are used principally for the transportation of crude cotton seed oil from the mills in the south to our refinery at Ivorydale. The crest of the season is from the first of September to the last of May, and during that season our tank cars are kept busy. During other parts of the year business is very slight and we have little use for them during those parts of the year. From September to the last of April——

The CHAIRMAN: Your answer apparently applies to the inbound movement of the raw cotton seed oil?

Mr. ANDERSON: Yes, sir.

The CHAIRMAN: How about the outbound movement of the refined oil?

Mr. ANDERSON: The outbound movement continues throughout the year; but it must be borne in mind that a considerable portion of the crude oil that is brought in in tank cars is used in the manufacture of soap and goes out as soap. Another considerable portion of it is shipped out in barrels, so that only a small portion of it goes out again in tank cars; and that continues throughout the year.

Mr. WARRINGTON: Could you state approximately the percentage of inbound loaded tank cars to outbound loaded tank cars?

Mr. ANDERSON: The inbound tank cars to loaded tank cars for cotton seed oil?

Mr. WARRINGTON: For everything in your business?

Mr. ANDERSON: I would estimate 30 per cent. as much outbound as inbound; that is merely an estimate.

Mr. WARRINGTON: That is, the outbound business is about 30 per cent. of the inbound business?

112 Mr. ANDERSON: Yes, sir.

The CHAIRMAN: Approximately how many loaded tank cars come into the plant and how many go out—loaded tank cars?

Mr. ANDERSON: Well, I would simply have to make an estimate of that. I would say that the average during the year would be ten tank cars a day inbound and about 3 tank cars a day outbound.

Mr. WARRINGTON: You are speaking of the Ivorydale line?

Mr. ANDERSON: Yes, sir.

Mr. WARRINGTON: Could you answer the same question relative to Kansas City and Staten Island?

Mr. ANDERSON: As near as I could come to it, it would be to divide those figures in half for each of the other two places.

Mr. WARRINGTON: And that represents about the capacity of the plants at Kansas City and Staten Island?

Mr. ANDERSON: That represents the capacity of the other two plants.

Mr. WARRINGTON: As compared with Ivorydale?

Mr. ANDERSON: Yes; as compared with Ivorydale.

Mr. WARRINGTON: And the same proportion of inbound to outbound business would apply?

Mr. ANDERSON: That would apply to the other points.

Mr. WARRINGTON: You say the greater part of your inbound business is cotton seed oil?

Mr. ANDERSON: The greater part of our inbound business; yes, sir. I would estimate that 80 per cent. of our inbound business in tank cars is crude cotton seed oil.

113 Mr. WARRINGTON: When those loaded tank cars arrive at the various plants, will you state generally what procedure is taken with them, what you do with them and with their contents.

Mr. ANDERSON: All of this crude cotton seed oil is bought on the basis of its being prime oil, subject to analysis and refining tests outlined by the Board or Arbitration of the Interstate Crushers Association, situated at Memphis. We will have a tank car sold to us of prime oil, and that means a prime quality of refined oil. Our first step is to take a sample of that crude oil as soon as that car is delivered to us, and in our refinery that sample is put through the prescribed test. If it stands the test satisfactorily, we proceed to unload the car. If it does not stand the test satisfactorily it is reported to the Arbitration Committee, and as a rule they will request a sample to be submitted to them to be tested by them. Whenever that is necessary, the interchange of correspondence and the interchange of samples delays the unloading of that car from a week to ten days. There is no delay in unloading the cars if the quality is up to the sample or type upon which it is sold.

Mr. WARRINGTON: Can you state about the percentage of cases where it is necessary to hold that car longer than the period of free time allowed by these demurrage rules for the purpose of adjusting the question of the quality?

Mr. ANDERSON: That is a very difficult question, but I would estimate that at one in ten; that is, one car in ten is thus delayed.

Mr. WARRINGTON: Then about 10 per cent. of your cars are delayed for the purpose of testing?

114 Mr. ANDERSON: For the purpose of arbitration on cotton seed oil.

Mr. WARRINGTON: Why do you have to hold that cotton seed oil in the tank cars pending that adjustment?

Mr. ANDERSON: It is required by the Interstate Crushers Association that it be done. This preliminary sample must be taken, and the contents of the car must not be disturbed in any way. If we attempted to unload the car, the first thing we would do would be to turn steam into the heating coil and that would put water in it. The first defense would be that we had put water into the oil in the unloading of it. So, in order that that question may not arise, we let the material stand in the tank cars until it is tested, and nothing is done about it other than to draw samples.

Mr. WARRINGTON: You say that will delay the unloading of cars from a week to ten days?

Mr. ANDERSON: The interchange of samples and of correspond-

ence, the adjustment of the matter to satisfy the Arbitration Committee and the shipper and consignee, delays the unloading of that car from a week to ten days, almost invariably.

Mr. WARRINGTON: Where those cars are delayed in that way, where are they stored?

Mr. ANDERSON: Right on our tracks.

Mr. WARRINGTON: Inside of the yard?

Mr. ANDERSON: Inside of the yard.

Mr. WARRINGTON: The demurrage rule in question here would require you to pay car service on those cars?

Mr. ANDERSON: After forty-eight hours.

Mr. WARRINGTON: Does that same condition apply to any
115 other commodities that you receive in tank cars?

Mr. ANDERSON: It applies practically to all the commodities we receive in tank cars, and on other commodities I think to a greater extent in that the test is not so simple. Grease and tallow, for instance, are all bought on the basis of analyses, guaranteed to contain not to exceed a fixed percentage of impurities. That analysis requires about 36 hours. We have to hold it for 36 hours to get the result of our analysis before we can take a step. The proceeding in the adjustment of that is not so clearly defined as it is in the case of cotton oil. There is no association which outlines the method of procedure. We have to take it up direct with the shipper. We have held tank cars for thirty days in making such adjustments.

Mr. WARRINGTON: These other commodities, grease and tallow, make up the other 30 per cent. of materials that come to you in tank cars?

Mr. ANDERSON: Yes, sir.

Mr. WARRINGTON: Did you state to the Commission the percentage of delayed cars there would be there on account of analyses?

Mr. ANDERSON: Well, there would be in those commodities about one in five; 20 or 25 per cent. of those would be delayed.

Mr. WARRINGTON: They would have to be held for how long?

Mr. ANDERSON: A week to 30 days.

Mr. WARRINGTON: For the same reason that the cotton seed oil is held?

Mr. ANDERSON: Yes, sir.

Mr. WARRINGTON: And during that time they would be standing on your tracks?

116 Mr. ANDERSON: Standing on our tracks; yes, sir.

Commissioner HARLAN: Where it develops your test was correct, that the oil or tallow was inferior, do you pay the demurrage, or the vendor?

Mr. ANDERSON: That our test is correct?

Commissioner HARLAN: Yes; that it is not up to grade of the invoice.

Mr. ANDERSON: I do not think we have ever charged any demurrage to the vendor. Mr. Buchanan can perhaps tell you about that, but I do not think we have ever charged any demurrage to the vendor, although it could rightfully be charged to them.

Mr. WARRINGTON: So far as you know, that has not been done?

Mr. ANDERSON: So far as I know that has never been done.

Mr. WARRINGTON: Are there any other occasions or times in your business when it is necessary to hold cars on your track for longer than the free time allowed by the demurrage rules?

Mr. ANDERSON: It happens quite frequently it is necessary, and we consider the tank cars as a utensil of service. That is perhaps not correct grammar, but we feel those tank cars ought to be serviceable to us for storage purposes. We buy grease and tallow and such commodities when the market is low, and we will buy in considerable quantities. Oftentimes we will buy beyond the capacity of our storage tanks. Whenever we get grease and tallow in the first step is to pump it into our storage tanks, and often, as I say, when the market is low, we buy in considerable quantities and it comes in in greater quantities than we can hold in our storage tanks.
117 Therefore we feel we are justified in holding that in our tank cars. When we get it in greater quantities than the capacity of our tanks can take care of, we hold it in tank cars and under these rules we would be called upon to pay demurrage after 48 hours upon every car so detained.

Mr. WARRINGTON: How long a time on the average would you hold cars in storage?

Mr. ANDERSON: We have held cars in storage for from 30 to 60 days in the summer season, when we do not need them. When there is no urgent demand for sending our tank cars out for crude cotton seed oil, we have held them in storage for from 30 to 60 days.

Mr. WARRINGTON: And you are required to pay demurrage under these rules?

Mr. ANDERSON: Yes, sir; under these new rules.

Commissioner HARLAN: Do you have storage tracks in your plant?

Mr. ANDERSON: Yes, sir.

Commissioner HARLAN: Special tracks for the storage of cars?

Mr. ANDERSON: Yes, sir; special tracks.

Mr. WARRINGTON: Would it be any considerable burden or labor upon your company to unload these cars you intend to use for storage purposes; then notify the railroad company that they are unloaded and so under their rules free from demurrage; and then reload them again for storage purposes?

Mr. ANDERSON: It would entail an expense. The expense of pumping such material as we get in tank cars is approximately five cents a hundred pounds. In order to relieve these cars from demurrage you could simply pump the contents into some small
118 tank and then load it right back into the tank cars. The expense of that operation would be about five cents a 100 pounds. And thereby, legally, these cars would be released at once from demurrage charges.

Mr. WARRINGTON: If you went through that process of pumping it out into a small tank and then pumping it back into the cars——

Mr. ANDERSON: It would cost us five cents a hundred pounds and the demurrage would cease.

Mr. WARRINGTON: Would that process release these cars for railroad service again immediately?

Mr. ANDERSON: It would not.

Mr. WARRINGTON: Because you would go on using them for storage?

Mr. ANDERSON: Yes, sir; and load back the material into the cars until we wanted it for such purpose as it was intended.

Commissioner CLARK: Will you tell us why it is the railroad that delivers these cars to Procter & Gamble does not charge demurrage on them?

Mr. ANDERSON: I do not understand the question.

Commissioner CLARK: Can you tell us why it is that the railroads that deliver these cars to The Procter & Gamble Company, and upon whose tracks the cars are standing, is not the one that charges the demurrage?

Mr. ANDERSON: I do not know.

Commissioner CLARK: The cars as I understand belong to The Procter & Gamble Company?

Mr. ANDERSON: Yes, sir.

Commissioner CLARK: The railroad also belongs to The Procter & Gamble Company?

Mr. ANDERSON: Yes, sir.

119 Commissioner CLEMENTS: About what percentage of these loaded cars that come in with crude oil are loaded with such inferior material as results in keeping them?

Mr. ANDERSON: In crude oil, about 10 per cent.; and in the other materials, about 20 to 25 per cent.

Commissioner CLEMENTS: What is the ordinary prevailing cause of the inferiority in the case of crude oil, for instance?

Mr. ANDERSON: In crude cotton seed oil the quality is impaired by the kind of seed from which it is milled; by seed allowed to become damp, mildewed, sour, which produces an inferior grade of oil.

Commissioner CLEMENTS: Is that generally the cause?

Mr. ANDERSON: That is generally the cause.

Commissioner CLEMENTS: The compression of green seed and unseasoned seed—would that have the same effect?

Mr. ANDERSON: It would affect the quality of the crude oil, the flavor of the oil. This oil is refined for edible purposes and the good flavor is very essential.

Mr. WARRINGTON: Does your company use any tank car equipment other than that owned by it?

Mr. ANDERSON: Except that owned by it?

Mr. WARRINGTON: Yes, owned by The Procter & Gamble Company.

Mr. ANDERSON: No. We have leased the cars for this service when our own equipment was insufficient.

Mr. WARRINGTON: Are those cars used within your factory grounds for any other purposes than storage and holding these goods awaiting analysis?

120 Mr. ANDERSON: They are used regularly for interdepartmental transportation of our materials. We load one material in one department, in one extremity of the plant, and transport it over our own rails by our own locomotive, to another department where it is used. That is done where the distance is too great to pump, or where the material is such it can not be handled in the pump.

Mr. WARRINGTON: And that is this same tank car equipment?

Mr. ANDERSON: Yes, sir. We have no special cars set aside for that purpose. We use any car for it.

Mr. WARRINGTON: When you lease cars from other car owners or car renting companies, does your company get exclusive right to the use and control of those cars?

Mr. ANDERSON: It is my understanding. I have never known them to be used for anything else when in our service or under our lease.

Mr. WARRINGTON: And they are used as your tank cars?

Mr. ANDERSON: Yes, sir.

Mr. WARRINGTON: And you pay the car leasing company a certain rental for the exclusive use of those cars?

Mr. ANDERSON: Yes, sir. I have never had anything to do directly with the leasing of those cars; but that is my understanding of the way the lease is arranged.

Commissioner CLARK: When you lease those cars do you get the mileage on them?

Mr. ANDERSON: I do not know. You will have to ask Mr. Buchanan.

121 Mr. WARRINGTON: I will ask Mr. Buchanan.

Mr. BUCHANAN: We do. We get credit for mileage. If we pay $35 a month for mileage and the car earns a mileage of $10, we only pay the difference.

Mr. WARRINGTON: In other words, they become your property by virtue of the lease?

Mr. BUCHANAN: Yes, sir.

The CHAIRMAN: So that between you and the railroad there is no difference between an owned and a leased car?

Mr. BUCHANAN: You understand that mileage is not paid to us, but to the car owner, and we take that up with him, not with the railroad. We do not negotiate with the railroad at all. A majority of our cars that are leased are rented for a long period, and we stencil on the cars "For the use of The Procter & Gamble Company." Thus we get whatever benefit that might give us for prompt movement.

Mr. MOORE: So far as the public is concerned, and the railroad is concerned, the situation of those leased cars is identical with the situation of those cars of which you have complete ownership?

Mr. BUCHANAN: Yes, sir.

Commissioner CLEMENTS: From whom do you lease?

Mr. BUCHANAN: Various private car owners.

Commissioner CLEMENTS: Have you ever leased any from a railroad company?

Mr. BUCHANAN: Yes, sir; we have.

Commissioner CLEMENTS: Have you any now?

Mr. BUCHANAN: Yes, sir. It is a very unusual thing for the railroad to own and operate and lease any tank cars.

122 Commissioner CLEMENTS: From what railroad do you lease?

Mr. BUCHANAN: We have some from the Kansas City Southern Railway and some from the Los Angeles & San Pedro.

Commissioner CLEMENTS: About how many?

Mr. BUCHANAN: My recollection is we have about 25 from the Kansas City Southern and 30 from the Los Angeles & San Pedro.

Comissioner CLEMENTS: They are exclusively under your own control and withdrawn from the railroad equipment?

Mr. BUCHANAN: They are withdrawn from their service.

Mr. WARRINGTON: Do you make the same arrangement as you do with the car service companies?

Mr. BUCHANAN: We pay about the same; there is no fixed arrangement.

The CHAIRMAN: Are those 55 cars included in the total number of 532?

Mr. BUCHANAN: No, sir.

The CHAIRMAN: Your testimony——

Mr. BUCHANAN (Interrupting): My testimony was only made relative to cars we owned.

The CHAIRMAN: And about 55 is the number you have now under lease?

Mr. BUCHANAN: Yes, sir.

Commissioner CLARK: When you lease them from a railroad company do you pay substantially the same rental that you do to a private car company for the same kind of a car?

Mr. BUCHANAN: We have that question up now. Yes, sir. You mean as to the costs?

Commissioner CLARK: Your rental.

123 Mr. BUCHANAN: Yes, sir; we pay the same thing. The question is up now. On the cars leased from the road they get a per diem instead of mileage. We have not yet come to exact terms with them, I think.

Commissioner COCKRELL: What is the per diem?

Mr. BUCHANAN: 25 cents a day, my recollection is.

Commissioner CLEMENTS: How long have you rented from the two railroads?

Mr. BUCHANAN: We have just recently rented them; we have not yet completed all the negotiations.

Mr. WARRINGTON: How recently?

Mr. BUCHANAN: Within 30 days. We have not got all of them as a matter of fact, yet.

Mr. WARRINGTON: And when you say a per diem, do you mean to say you pay the railroad——

Mr. BUCHANAN: No, sir. The railroads pay the railroad owning the car a per diem. Those are not cars of private ownership. They are railroad ownership, and they are paid a per diem instead of a mileage.

Mr. WARRINGTON: And there is no claim on them, for the release of those 55 cars, is there, that they should not be subject to the demurrage rules set forth here?

Mr. BUCHANAN: Nothing at all.

Mr. WARRINGTON: The whole case here which we have made is with reference to cars of private ownership which this company receives a mileage on and has no reference to cars on which it receives a per diem.

The CHAIRMAN: Are there any further questions to be asked of Mr. Anderson?

Mr. WARRINGTON: One more question. Do any of these defendant companies in these two proceedings furnish tank cars as part of their equipment?

124 Mr. ANDERSON: I have never heard of any of those companies owning tank cars. They have never furnished us with any.

Commissioner CLARK: They have never furnished you cars for the shipment of your commodities?

Mr. ANDERSON: They never have.

Mr. WARRINGTON: And you had the alternative of either purchasing or leasing the cars or shipping in barrels?

Mr. ANDERSON: Or shipping in barrels; and the cost of barrels is very excessive these days, and makes that prohibitive.

The CHAIRMAN: That appears to be all. You are excused, Mr. Anderson.

Is there any further testimony, Mr. Warrington?

Mr. WARRINGTON: We have no further testimony.

The CHAIRMAN: Do the carriers desire to call any witnesses?

Mr. BARTON: We have here the General Superintendent of the Staten Island Rapid Transit Railway Company, and also a joint employé of the defendants at Ivorydale, of the B. & O. S. W., the C. H. & D., the Big Four and the Norfolk & Western. Those gentlemen are entirely familiar with the workings of the business at these respective plants. I think everything they could say has already been testified by the other gentlemen, but they are here for examination, if the Commission desires to ask either of them any questions.

The CHAIRMAN: That appears to be the case, then.

The following testimony was adduced during the argument:

125 Mr. WARRINGTON: Mr. Buchanan, is there any arrangement at Kansas City by which a railroad company can use these tracks on your property for any other purpose than your own business?

Mr. BUCHANAN: Absolutely none. They would only perform service either on inbound or outbound business, on our orders.

Mr. WARRINGTON: Do those tracks connect with any other industry than your own?

Mr. BUCHANAN: No, sir.

Commissioner HARLAN: Right there I would like to ask a question which perhaps does not appear in the record. Who ordinarily pays

the inbound freight charges? In other words, do you own the property at the point of origin, or do you receive it at Ivorydale subject to tests and while it is still the property of the consignor?

Mr. WARRINGTON: I understand it is the property of the consignee subject to an adjustment, awaiting the result of test and analysis.

Commissioner HARLAN: The consignee ordinarily pays the freight. Is that true, Mr. Buchanan?

Mr. BUCHANAN: Yes sir.

Commissioner HARLAN: The original contract of transportation from point of origin to Ivorydale is a contract by The Procter & Gamble Company?

Mr. BUCHANAN: In almost every case we buy that on a bill of lading, and we pay the freight. I can not call an instance of these commodities where we have not paid the freight subject to these regulations which Mr. Anderson mentioned.

The CHAIRMAN: That is to say, you take the delivery of the crude oil you buy at the point of origin and transport it yourself?

126 Mr. BUCHANAN: Yes sir.

Mr. WARRINGTON: And pay the freight to the railroads.

Mr. BUCHANAN: Well, I said subject to the regulations as to quality——

Mr. ANDERSON: We do not accept it as to quality at the point of shipment.

Commissioner CLARK: Is it subject to rejection at Ivorydale?

Mr. BUCHANAN: Yes sir.

Commissioner HARLAN: In that case, who pays the freight?

Mr. ANDERSON: The shipper pays the freight, although they might have our money for the payment of the goods, but they would return the money to us.

It is stipulated and agreed by and between the complainant and the defendant railway companies that the complainant has paid the following sums to the various defendant railway companies for demurrage charges on its tank cars on private tracks from April 1, 1910, to April 1, 1911.

Ivorydale.

Norfolk & Western Railway Company	$71.00
Baltimore & Ohio Southwestern Railway Company	99.00
Cincinnati, Hamilton & Dayton Railway Company	196.00
Cleveland, Cincinnati, Chicago & St. Louis Railway Company	1,129.00

Kansas City.

Kansas City Southern Railway Company	15.00
Kansas City Terminal Railway Company	68.00
Chicago, Rock Island & Pacific Railway Company	287.00

127 Port Ivory.

Staten Island Rapid Transit Railway Company.....	2,793.00
	$4,658.00

NOTE.—The above amounts are subject to correction at any time before the hearing of this cause.

It is stipulated and agreed that the substance of Complainant's Exhibit No. 1, mentioned on page 21 herein, is contained in Rule 29 printed on pages 19 and 20 herein, and that said Complainant's Exhibit No. 1 need not be printed.

It is stipulated and agreed that Exhibit A, attached to the petition in this case, is identical, so far as the demurrage rules complained of in this cause are concerned, with Complainant's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8 and 9, referred to on page 34 herein, and that said exhibits need not be printed.

128 *Journal Entry.*

Proceedings of May 18, 1911.

No. 9.

PROCTER & GAMBLE COMPANY, Petitioner,
vs.
UNITED STATES et al., Respondents.

Said cause came on before the Court for final hearing upon the merits and the arguments of counsel were commenced; George H. Warrington, Esq., appearing on behalf of the petitioner and F. J. Farrell, Esq., on behalf of the Interstate Commerce Commission. On request of Mr. Warrington, the Swift Refrigerator Transportation Company was granted leave to file a brief.

129 *Journal Entry.*

Proceedings of May 19, 1911.

No. 9.

THE PROCTER & GAMBLE CO., Petitioner,
vs.
THE UNITED STATES et al., Respondents.

Said cause came on before the Court for further hearing upon the merits and the arguments of counsel were concluded; Blackburn Esterline, Esq., appearing on behalf of the United States, Edward Barton, Esq., on behalf of the Cincinnati, Hamilton & Dayton

Railway Company, the Baltimore & Ohio Southwestern Railroad Company and the Staten Island Rapid Transit Railway Company, and George H. Warrington, Esq., on behalf of the petitioner. Thereupon said cause was taken under advisement by the Court.

130 *Order Entered May* 19, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER AND GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA et al., Respondents.

This cause coming on this day to be heard on its merits in pursuance of the order of the Court; and the petitioner and the respondents, the United States and the Interstate Commerce Commission, having agreed in open court to submit the said cause on the petition filed in this Court and the evidence taken before the Interstate Commerce Commission; but that the said two respondents have not agreed to the amount of the demurrage charges and the payment of the same or any part thereof by the said petitioner to the Railway Companies; and it further appearing that the respondents, the United States and the Interstate Commerce Commission, have filed motions to dismiss the petition and have elected to stand upon the same; on motion duly made in open court in that behalf—

It is ordered, That the stipulation of the petitioner and the Railway Companies as to the amount and payment of the said demurrage charges or any part of the same constitute no part of the record in this cause between the petitioner and the respondents, the United States and the Interstate Commerce Commission; that the said motions of the said two respondents be and the same are now hereby made and are to be taken and considered as motions to dismiss the said cause as the same stands on the petition and the evidence taken before the Interstate Commerce Commission; and that the said cause be and the same is hereby finally submitted by the said two respondents on their said motions.

By the Court.

MARTIN A. KNAPP,
Presiding Judge.

131 *Opinion.*

Filed July 20, 1911.

United States Commerce Court, May Session, 1911.

No. 9.

THE PROCTER & GAMBLE CO.
v.
UNITED STATES et al.

On Final Hearing.

(For opinion of Interstate Commerce Commission, see 19 Inter. Com. Com. Rep., 556.)

George H. Warrington for petitioner.
P. J. Farrell for Interstate Commerce Commission.
Blackburn Esterline for United States.
Edward Barton for respondent railroads.

[July 20, 1911.]

ARCHBALD, *Judge:*

The Procter & Gamble Co., the petitioner, is engaged in the manufacture of soap, and the refining of cottonseed and other oils, and owns large industrial establishments at Ivorydale, Ohio, Port Ivory, N. Y., and Kansas City, Kans. In all its plants it has and maintains private railroad tracks, for the purpose of receiving cars from the interchange tracks which connect it with the respondent railroads. At two of the places named it owns and employs its own locomotives and itself performs the entire switching of cars, and at the other the switching is performed by the railroads under contract, which is paid for separate and apart from the transportation charges. In every instance the tracks are owned by the company, are on its own land, and the railroads have no interest or control over them.

The Procter & Gamble Co. is also the owner of 532 oil-tank cars, which it purchased at a cost of about $500,000. These cars are necessary for the transportation of the oils, grease, and other like commodities used by the company in its business, and were purchased by it in relief of the railroads, which were and are not prepared to furnish them. These tank cars, when loaded by the petitioner at its several establishments, are tendered to the connecting railroads for shipment, and are hauled to their various destinations at the regular published rates for the respective commodities with which
132 they are loaded. The use of these cars is confined to the petitioner's business, and in consideration of the petitioner's furnishing them an allowance is made by the railroads of three-quarters of a cent a mile per car for each mile that it is hauled, this allowance

being in accordance with the published tariffs of the railroads with respect to the movement of all private tank cars.

Until the adoption of the rule set forth below, no demurrage was ever charged by any of the respondent railroads for delay in unloading private tank cars while standing on the private tracks of the owner. But beginning in February, 1910, and following that, the railroads have published, as part of their so-called "uniform demurrage code," the following rule, which is the subject of this controversy:

"Private cars while in railroad service, whether on the carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of the shipper.

"Private cars under lading are in railroad service until the lading is removed and the cars are regularly released.

"Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed."

The demurrage rules, of which this is a part, were prepared by a committee of the National Association of Railway Commissioners, composed of a representative from each State having a railroad commission and a member of the Interstate Commerce Commission; and were adopted by the association in convention and later approved, although not prescribed, by the Interstate Commerce Commission.

After the publication of the rule in controversy, but before it had gone into effect, the Procter & Gamble Co. made complaint to the Interstate Commerce Commission, and sought to have the rule set aside, in so far as it permitted the railroads to make a demurrage charge against the private cars of the company after they had been delivered to it and were standing on its own private tracks. But after a due hearing the Commission dismissed the complaint, and the respondent railroads are now exacting demurrage charges in accordance with the provisions of the rule.

The proceedings in this court are brought to set aside the order of the Commission dismissing the complaint and refusing relief, the allegation being made that the rule, in so far as it provides that privately owned cars under lading on private tracks are in railroad service, and so subject to a demurrage charge until the lading is removed, is unjust and unreasonable and deprives the company of the right to use its private cars on its private tracks for its own purposes unless demurrage is paid therefor, thereby permitting the respondent railroads to deprive the company of its property without due process of law, in violation of the fifth amendment to the Constitution and the acts regulating interstate commerce. The prayer of the
133 petition is that the order of the commission dismissing the complaint may be annulled and the respondent railroads en-

joined from collecting the demurrage charge, and that they may be further required to repay to the petitioner the sums which they have wrongfully collected from it under the rule.

The United States moves to dismiss the petition on the ground that this court has no jurisdiction in the premises; or that, if it has, no cause of action is made out which entitles the petitioner to relief. And in this motion the Interstate Commerce Commission and the several railroads which have been summoned as respondents join.

The jurisdiction of this court is denied on the ground that the petitioner is a shipper, and the Interstate Commerce Commission having merely dismissed the complaint which was made to it, and granted no affirmative relief, that there is nothing in the order of dismissal which it entered that affords any basis for action here. Or, in other words, that it is only the carrier against which an order is made in favor of the shipper that can bring the case for review into this court, the shipper being concluded by the action of the commission, whatever it may chance to be. This is a serious question, which merits careful consideration and is not altogether easy to solve.

By the act by which the Commerce Court was created (act June 18, 1910; 36 Stat., 539), it was given "the jurisdiction now possessed by circuit courts of the United States and the judges thereof" of, inter alia, "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." It was also therein further provided that "in all cases within its jurisdiction the Commerce Court and each of the judges assigned thereto shall respectively have and may exercise any and all the powers of a circuit court of the United States, and of the judges of said court respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred;" and, conversely, that nothing in the act should be construed as enlarging the jurisdiction at the time possessed by said circuit courts, or the judges thereof, thereby transferred to and vested in the Commerce Court; the jurisdiction, however, so far as conferred, to be exclusive, and so far as not conferred being reserved. The question, then, is whether upon any recognized ground of equity practice the present petitioner, under the law as it previously stood, would have had the right to apply by bill to a circuit court of the United States to set aside the action of the Interstate Commerce Commission dismissing its complaint, and to enjoin the enforcement by the railroads of the demurrage charge which in effect was thereby approved.

It is of no significance in this connection, nor of any assistance in the solution of the question, that suits in this court to enjoin, set aside, annul, or suspend any order of the Commission are required to be brought against the United States. It is just as consistent that the United States should be the respondent in cases brought for this purpose by the shipper as in cases brought by the carrier, the Government in each case standing for the order of the commission which it is thus appointed to justify and defend.

Neither does it detract from the jurisdiction of this court that under the law as it previously stood, the venue of suits brought in the circuit courts of the United States against the Commission to

set aside its orders was fixed in each case in the district where the carrier against which the order was made had its principal
134 operating office, jurisdiction to hear and determine such suits being in terms vested in the courts of such district. (Act June 29, 1906, sec. 16, 34 Stat., 592.) This was a favor to the carrier adversely affected by the order. And according to the law at the time, the commission being the respondent, provision had to be made for jurisdiction over it by the courts of the various districts throughout the country where it was liable to be summoned. It was to meet this situation that jurisdiction was given in terms over suits of the character mentioned to the courts of the district where the carrier against which the order was made had its principal office. Nothing more was intended, and nothing more is to be made out of this provision of the law. Certainly nothing adverse to possible suits by others than the carrier is to be thereby implied.

The real argument against the right of suit, where the complaint of a shipper has been dismissed, is that the denial of relief by the commission is not an order of which the courts can lay hold. Such an order, it is urged, must be one specifically requiring that something shall or shall not be done before this is the case. In Peavey v. Union Pacific Railroad (176 Fed., 409) it is said:

"A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission, to those who were parties to the proceedings before it, upon which the order was based. The proceeding in court is not an appeal; it is a plenary suit in equity. * * * The determination of the question, what parties may maintain such suits is left by the * * * act to the general rules and practice in equity, and under them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a Federal court of equity for relief."

But there was an order of the Commission in that case which prohibited the railroads from paying to complainants, and others who were owners of elevators located upon their lines, any compensation for the elevation of grain in transit, so that the law was unquestionably not so far as there being an order is concerned; and the case therefore decided nothing more than that the right to resort to the courts is not confined to the carrier, but extends to everyone injuriously affected by the order of the Commission, even though not a party to the proceedings before it in which the order was made. To that extent, but no further, it is pertinent here. Putting aside, however, for the moment the provisions of the statute, and considering the case as though it had not been passed, it is clear that a shipper would have been entitled, in one form or another, to redress in court against an unjust and unlawful charge or practice imposed by a carrier, such as the one here is alleged to be. And it would have been permissible therefore for the Procter & Gamble Co., denying the right of the carrier to make this demurrage charge, to have refused to pay it and compel the carriers to bring suit therefor; or, in view of the complications to which this would give rise, to say noth-

ing of the multiplicity of suits with different carriers which would be likely to ensue, and in order to settle the matter as to all parties once for all, it would have had the undoubted right to go into a court of equity by bill and have the legality of the practice tested, and, if found to be unjustified, enjoined. (Donovan v. Pennsylvania Co., 199 U. S., 279.) Indeed, the only question would
135 seem to be whether this was not the course which the company, even considering the provisions of the statute, was required to pursue, the legality of the demurrage charge being the only thing involved, and that being a matter for the courts and not for the commission to decide. (Hite v. Central Railroad of New Jersey, 171 Fed., 370. See also Danciger v. Wells Fargo & Co., 154 Fed., 379, and Langdon v. Pennsylvania R. R., 186 Fed., 237.) It was decided, however, in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co. (204 U. S., 426) that redress by a carrier against an unjust and unreasonable rate must be sought in the first instance by proceedings before the Commission, and that only after that could an action be maintained against the carrier for reparation based on the result. This conclusion was reached, and the common-law right of action otherwise existing held to be abrogated by implication, in view of the system established by the enactments with regard to rate regulation by the Interstate Commerce Commission, and as necessary to the efficiency of that system, which otherwise would be subverted and made nugatory. And this was repeated in Baltimore & Ohio Railroad v. Pitcairn Coal Co. (215 U. S., 481), where it was held that, for the correction of an unequal distribution of cars, a shipper was similarly required to go to the Commission, and could not in advance of its action seek to remedy by mandamus the discrimination alleged. And Meyersdale Coal Co. v. Pennsylvania Railroad (183 Fed., 929) also is to the same effect. But if that be so, there can be no serious question as to the propriety, if not the necessity, for the present petitioner going first to the Commission to have determined whether the demurrage charge in controversy was a just and reasonable requirement. And it can not be that the implication by which this is brought about is to be carried so far as to make the action of the Commission conclusive where relief is denied. There is no such compelling necessity in order to save the system; nor is the statute to be construed as requiring exclusive resort to a tribunal where the rights of the party can be only partially determined at the sacrifice of other rights which the courts of the land are appointed to consider and defend. This is not to deny that in questions of fact, or where judgment or expediency is involved, the action of the Commission in denying relief, the same as in granting it, may not be final. But where, as here, it is not the amount that is in dispute—$1 a day per car being recognized as reasonable if there is to be any charge—but the right of the carrier, under the circumstances, to make any charge at all, it is not to be implied, unless there is no escape from it, that the decision of the Commission adverse to the shipper is to foreclose the question. And while the dismissal of a complaint by the Commission in a case like the present one may not in strictness be an order,

in that it does not require or prohibit that anything shall or shall not be done, it is so in substance and effect, in that, by refusing to interfere with the practice or the charge complained of, it virtually approves it and makes it operative. If it was required by the act to hold that a court could not interfere with such an order however confiscatory to the shipper it might be, the shipper being thus without legal redress, the act might well be declared unconstitutional as wanting in due process of law.

The action of the Commission, if to be given any force, having thus the effect of an adverse decision with respect to the question involved, must be regarded, even though negative in char-
136 acter, as an order within the meaning of the statute, which the courts may enjoin or set aside if legal or equitable grounds for doing so are found to exist. The petitioner therefore correctly came into this Court, as it could previously have gone into a Circuit Court of the United States—the requisite amount being involved and the case being one arising under the Federal law—to have the action of the commission dismissing its complaint set aside and the demurrage charge disallowed, if that should be the conclusion reached with regard to it, either by direct decree or by remanding the case to the Commission with directions to sustain the complaint.

But while the jurisdiction of this Court in the premises is thus sustained, we are forced to conclude, upon a consideration of the merits, that the demurrage charge in controversy was lawfully imposed, and that the petitioner therefore has no just ground for complaint. The argument against the charge proceeds upon a misconception. Baldly put, as an exaction for the use by the shipper of his own cars while standing on his own private tracks, the right to it might well be questioned. Neither is it to be sustained as compensation to the carrier for an additional service not covered by the transportation charge, that is to say, for the storage of the freight with which the cars are loaded, that storage being in the cars and on the tracks of the shipper and not in or on anything which the carrier has supplied. (In re Demurrage on Private Tank Cars, 13 Inter. Com. Com. Rep., 378, 381.) It is difficult also to see how the imposition of demurrage on private cars for delay in unloading is necessary to prevent unjust discrimination, the shipper who is able to provide such cars having an advantage over those who can not, which this regulation is supposed to correct. The ability to own private cars is a mere matter of capital which the undue withholding or the prompt unloading and releasing of them can hardly affect, and the difference in financial circumstances is an advantage, which the law can not undertake in this way to overcome. (Peavey v. Union Pacific Railroad, 176 Fed., 409, 419.) It may not be consistent also with the exaction of this charge that provided only the cars are unloaded within the free time allowed, they may be reloaded and retained by the shipper indefinitely without any claim being made for demurrage. If this, which is the practical construction of the rule, is to be accepted as the correct one, it throws serious doubt on its validity, the real ground on which the charge is to be sustained being the right of the carrier to have the cars promptly

returned into service, which this has the effect to undo. Nor is the condition of the cars, once they have been delivered to the shipper, whether loaded or unloaded, of any concern to the carrier, except as an end to getting them back into use again. And there is also an apparent inconsistency in holding inbound cars liable to demurrage after they have been delivered and are on the tracks of the owner until they are unloaded, barring the free days, and yet in imposing it on outbound cars without regard to when they are loaded, only from the time they are placed on the interchange tracks. The justification of the rule is therefore to be sought in something outside of all this, upon a determination of the real principle involved.

It is not necessary to decide whether a railroad can refuse or be required to haul private cars. Whatever may be its duty in this regard, it is conceded that such terms may be imposed as a condition to hauling them as have a reasonable relation to the trans-
137 portation service in which they are employed. And this concession necessarily sustains the present charge. In using these cars, whether as supplementary to or in place of their own, the railroads are entitled to require that there shall be a reasonably dependable supply, and that such cars shall not be withdrawn at will to serve the private purposes of the owners, but shall be kept in active and steady use, and to that end that they shall be put on a footing in this respect with other cars. The interest of the carrier that this should be the case is clear. For the time being these cars become a part of the rolling stock of the road, taking the place of those which the carrier would otherwise be called upon to supply. It may be that there are some kinds of these cars, such as the tank cars here, which the railroads do not keep on hand, but rely on each shipper furnishing his own. But that does not change the principle involved. In one form or another, the carrier is bound to supply the necessary transportation facilities for handling every kind of freight. And this, not to one shipper only, but equally and without discrimination to all. And it is put at a disadvantage and an extra burden upon it imposed if it can not be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess, according as private cars are released or withheld. This the demurrage charge which is complained of is calculated to overcome, and therefore may justly be imposed. The purpose of demurrage is to force the cars back into use. Delay is made expensive, so that it may an object to the shipper which he can not afford to disregard. Its exaction from private cars, the same as others, is therefore neither arbitrary nor unjust.

Nor is it violative of the owner's rights. It is simply a condition to the acceptance of his cars, which, for the reasons given, the carriers have found it necessary to impose, and with which therefore he must expect to comply. Presumably the use of these cars operates to his advantage, or he would not be at the expense of supplying them. But he can not expect that the advantage shall be all on one side. And it having been found by experience that demurrage on private, the same as on public, cars is a necessary transportation regulation, which is justified on principle, the carriers were within

their rights in imposing it by the rule in question, and it must therefore be sustained.

The petition will be dismissed on the merits with costs.

KNAPP, *Presiding Judge*, concurring:

The conclusion reached in this case is undoubtedly correct, and I disagree with the foregoing opinion only so far as it questions the right to enforce the demurrage rule in controversy for the purpose or in aid of preventing undue preference and advantage to the owners of private cars. The commission based its decision in part on this ground and, in my judgment, was right in so doing.

138 *Order Dismissing the Petition.*

Entered July 20, 1911.

In the United States Commerce Court, May Term, 1911.

No. 9.

THE PROCTER & GAMBLE COMPANY
v.
UNITED STATES et al.

Now, July 20, 1911, this cause coming on to be heard on petition, answers and proofs, and having been argued by counsel, George H. Warrington, Esq., appearing for the petitioner, P. J. Farrell, Esq., for the Interstate Commerce Commission, Blackburn Esterline, Esq., for the United States, and Edward Barton, Esq., for the respondent railroads, upon due consideration thereof, it is ordered, adjudged and decreed that said petition be dismissed with costs.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

139 *Petition for Appeal.*

Filed August 16, 1911.

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

Petition for Appeal to the Supreme Court of the United States.

The above named complainant, conceiving itself aggrieved by the decree made and entered on the 20th day of July, 1911, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, or the original record, may be sent to the Supreme Court of the United States.

GEORGE H. WARRINGTON,
Attorney for Complainant.

Dated this 16th day of August, 1911.

The foregoing claim of appeal is allowed.

R. W. ARCHBALD,
Judge of the United States Commerce Court.

Dated this 16th day of August, 1911.

140 *Assignments of Errors.*

Filed August 16, 1911.

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Defendants.

Assignment of Errors.

The complainant prays an appeal from the final decree of this court to the Supreme Court of the United States and assigns for error:

First. That the court erred in granting judgment in favor of the defendants and dismissing complainant's petition.

Second. That the court erred in upholding the validity of Rule 1 of the Car Demurrage Rules complained of so far as such rule authorizes demurrage charges on privately owned cars on private tracks.

Third. That said Rule 1 of said Car Demurrage Rules in so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by the tariffs of the defendant railway companies until the lading is removed is unjust and unreasonable in that it deprives complainant of the right to use its private cars upon private
141 tracks for its own purposes without paying the defendant railway companies demurrage charges therefor after said private cars have been delivered to complainant and have actually ceased to be in railroad service.

Fourth. That the charges exacted by the defendant railway companies of the complainant under the aforesaid provision of said Rule 1 of said Car Demurrage Rules permit the defendant railway companies to take complainant's property without compensation and deprive it of its property without due process of law in violation of the Constitution of the United States and particularly of Article V in amendment thereof.

Fifth. That said provision of said rule is in violation of the Federal Act to Regulate Commerce, approved February 4, 1887, (24 Statutes at Large, 379) and particularly of Sections 1 and 15 thereof as amended June 29, 1906, (34 Statutes at Large, 584).

Sixth. That the order of the Interstate Commerce Commission of November 14, 1910, complained of in this action and upheld by this court is null and void and beyond the power of the Interstate Commerce Commission.

Seventh. That the court erred in refusing to set aside and annul said order of said Interstate Commerce Commission and in refusing to enjoin defendant railway companies and each of them from collecting or attempting to collect any demurrage charges upon complainant's loaded tank cars after said cars have been delivered to complainant and placed upon tracks owned and controlled by it.

Eighth. That the court erred in refusing to require the defendant railway companies to repay to the complainant all sums wrongfully collected by them or any of them under said Rule 1 of said Car Demurrage Rules complained of in this action.

142 Ninth. That the judgment rendered in this cause on July 20, 1911, is contrary to law.

Wherefore complainant prays that the judgment and decree of said United States Commerce Court be reversed.

GEORGE H. WARRINGTON.
Attorney for Complainant.

Presented this 16th day of August, A. D. 1911.

R. W. ARCHBALD,
U. S. Judge.

143 *Petitioner's Appeal Bond.*

Filed August 16, 1911.

Know all Men by These Presents: That The Procter & Gamble Company, a corporation, as principal, and William Cooper Procter and Herbert G. French, of Cincinnati, Ohio, as sureties, are held and firmly bound unto the United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, and Chicago, Rock Island and Pacific Railway Company in the full and just sum of Five Hundred ($500.) dollars to be paid to the said the United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company and Chicago, Rock Island & Pacific Railway Company, their successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors,

administrators, successors and assigns, jointly and severally by these presents. Sealed with our seals and dated this 16th day of August, in the year of our Lord one thousand nine hundred and eleven.

Whereas, on the 20th day of July, 1911, in the United States Commerce Court in a suit depending in said court between The Procter & Gamble Company, complainant, and The United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Com-
141 pany, Kansas City Southern Railway Company, Kansas City Terminal Railway Company and Chicago, Rock Island & Pacific Railway Company, defendants, a decree was rendered against the said The Procter & Gamble Company, and the said The Procter & Gamble Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, and Chicago, Rock Island & Pacific Railway Company citing and admonishing them to appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 15th day of September next.

Now, the condition of the above obligation is such that if the said Procter & Gamble Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

THE PROCTER & GAMBLE COMPANY,
By WILLIAM COOPER PROCTER,
President.

Attest:
H. L. FRENCH,
Secretary.

WILLIAM COOPER PROCTOR.
HERBERT G. FRENCH.

Signed and delivered in the presence of
R. B. KIDD.
GEO. S. WOODWARD.

Approved by:
R. W. ARCHBALD,
Associate Judge of the United States Commerce Court.

145 *Order Allowing Appeal.*

Filed August 16, 1911.

In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, KANSAS CITY SOUTHERN RAILWAY COMPANY, KANSAS CITY TERMINAL RAILWAY COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Respondents.

Order Allowing Appeal.

In this cause, the Procter & Gamble Company, Petitioner, by George H. Warrington, its solicitor, having made its application in writing for an appeal to the Supreme Court of the United States from the decree of the United States Commerce Court entered on the 20th day of July, 1911;

It is therefore ordered that said appeal be, and the same is hereby granted, and made returnable on the 15th day of September, 1911, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers and proceedings to the Supreme Court of the United States.

R. W. ARCHBALD,
Judge of the United States Commerce Court.

Dated this 16th day of August, 1911.

146 *Certificate.*

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA et al., Respondents.

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify that the Honorable Martin A. Knapp, the Presiding Judge of said Court, was absent and outside the jurisdiction of the United States on the 16th and 17th days of August, 1911, and the Honorable Robert W. Archbald, the senior Associate Judge of

said Court, thereupon succeeded to the place and powers of the Presiding Judge.

Witness my hand and the seal of the United States Commerce Court this 30th day of August, 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk*,
By W. S. HINMAN,
Deputy Clerk.

147 *Transcript of Docket Entries.*

United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Respondents.

Attorneys:

George H. Warrington, for Petitioner.
James A. Fowler, Blackburn Esterline, for the United States.
P. J. Farrell, for the Interstate Commerce Commission.
R. Walton Moore, for Norfolk & Western Railway Company.
Edward Barton, for other respondents.

Proceedings.

1911.

February 22. Petition filed in United States Commerce Court.

March 14. Copy of petition served on all respondents except Interstate Commerce Commission.

March 15. Copy of petition served on Interstate Commerce Commission.

March 20. Appearance of P. J. Farrell for Interstate Commerce Commission, filed.

March 21. Motion to dismiss filed by Interstate Commerce Commission.

March 23. Answer of Staten Island Rapid Transit Railway Company, filed.

March 23. Answer of Baltimore & Ohio Southwestern Railroad Company, filed.

148 March 25. Notice to Petitioner's solicitor of appearance of P. J. Farrell for Interstate Commerce Commission, filed.

March 29. Answer of Norfolk & Western Railway Company, filed.
March 30. Appearance of R. Walton Moore for Norfolk & Western Railway Company, filed.
March 30. Answer of Kansas City Terminal Railway Company, filed.
March 31. Motion to dismiss filed by the United States.
March 31. Certificate of mailing of copies of motion of the United States.
April 3. Answer of respondent, The Cincinnati, Hamilton & Dayton Railway Company, filed.
April 8. Brief of United States in support of motion to dismiss, filed.
April 10. Answer of Chicago, Rock Island & Pacific Railway Company, filed.
April 11. Order extending time of United States to file answer, filed.
April 13. Answer of Cleveland, Cincinnati, Chicago & St. Louis Railway Company, filed.
April 13. Stipulation to extend time for filing answer of Kansas City Southern Railway Company, filed.
April 14. Order entered per Curiam, overruling motion to dismiss, and directing that the case be heard upon the merits on May 18, 1911.
April 15. Separate answer of respondent, The Kansas City Southern Railway Company, filed.
May 13. Record before Interstate Commerce Commission, filed.
May 16. Brief for Petitioner, filed.
May 18. Brief for respondents with respect to their right to assess demurrage on private cars on private tracks, filed.
May 18. Brief on behalf of Swift Refrigerator Transportation Company, filed.
May 19. Order entered as to stipulation and motions of United States and Interstate Commerce Commission.
149 May 31. Closing argument of G. H. Warrington on behalf of petitioner, filed.
July 20. Order entered dismissing bill of complaint with costs.
July 20. Opinion and concurring opinion, filed.
August 16. Petition for appeal by petitioner, filed.
August 16. Assignment of errors filed.
August 16. Appeal bond filed.
August 16. Order allowing appeal, filed.
August 16. Citation on appeal filed.
August 17–18. Certified copy of citation on appeal served on each respondent.

150 In the United States Commerce Court.

No. 9.

THE PROCTER & GAMBLE COMPANY, Petitioner,
vs.
THE UNITED STATES OF AMERICA, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, KANSAS CITY SOUTHERN RAILWAY COMPANY, KANSAS CITY TERMINAL RAILWAY COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 149, inclusive) to be a true and complete transcript of the proceedings had of record in the above entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 2d day of September, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk*,
By W. S. HINMAN,
Deputy Clerk.

151 United States Commerce Court. Filed Aug. 16, 1911. G. F. Snyder, Clerk. D.

9.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Company, Kansas City Terminal Railway Company, and Chicago, Rock Island & Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty (30) days from the date of this writ, pursuant to an appeal, duly allowed by the United States Commerce Court and filed in the clerk's office of said court on the sixteenth day of August, A. D., 1911, in

a cause wherein The Procter & Gamble Company is appellant and you are appellees, to show cause, if any, why the decree rendered against said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this sixteenth day of August, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER,
Clerk of the United States Commerce Court,
By W. S. HINMAN,
Deputy Clerk United States Commerce Court.

Allowed:

R. W. ARCHBALD,
Associate Judge.

152 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 17th day of August, 1911, I served the within citation on appeal on the United States of America by leaving a copy thereof with Hon. Geo. W. Wickersham, Attorney General its designated agent, at —— the same being his office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to Blackburn Esterline, Southern Building.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Interstate Commerce Commission by leaving a copy thereof with Hon. Judson C. Clements, Chairman its designated agent, at —— the same being his office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to J. H. Howell, I. C. C.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Cincinnati, Hamilton & Dayton Railway Company by leaving a copy thereof with George E. Hamilton its designated agent, at the Union Trust Building the same being his office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to H. R. Gower.

153 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Baltimore & Ohio Southwestern Railroad Company by leaving a copy thereof with George E. Hamilton its designated agent, at the Union Trust Building the same being his office in the City of Washington, District of Columbia.
August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to H. R. Gower.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on the Norfolk & Western Railway Company by leaving a copy thereof with R. Walton Moore its designated agent, at the District National Bank Building the same being his office in the City of Washington, District of Columbia.
August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to W. H. Fowle.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Staten Island Rapid Transit Railway Company by leaving a copy thereof with George E. Hamilton its designated agent, at the Union Trust Building the same being his office in the City of Washington, District of Columbia.
August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to H. R. Gower.

154 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on the Cleveland, Cincinnati, Chicago & St. Louis Railway Company by leaving a copy thereof with C. N. Osgood its designated agent, at the Colorado Building the same being his office in the City of Washington, District of Columbia.
August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to J. H. Hinwood.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Kansas City Southern Railway Company by leaving a copy thereof with Britton & Gray its desig-

nated agent-, at the Munsey Building the same being *his* office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to E. Jackson.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on the Kansas City Terminal Railway Company by leaving a copy thereof with Britton & Gray its designated agent-, at the Munsey Building the same being *his* office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to E. Jackson.

155 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 18th day of August, 1911, I served the within citation on appeal on The Chicago, Rock Island & Pacific Railway Company by leaving a copy thereof with Thomas P. Littlepage its designated agent, at the Union Trust Building the same being his office in the City of Washington, District of Columbia.

August 18, 1911.

F. J. STAREK, *Marshal.*

Copy handed to L. R. Alden.

156 [Endorsed:] No. 9. United States Commerce Court. The Procter & Gamble Company, Complainant, vs. The United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, The Baltimore & Ohio Southwestern Railroad Company, Norfolk & Western Railway Company, The Staten Island Rapid Transit Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Kansas City Southern Railway Co., Kansas City Terminal Railway Co., and Chicago, Rock Island & Pacific Railway Company, Defendants. Citation.

Endorsed on cover: File No. 22,856. United States Commerce Court. Term No. 780. The Procter & Gamble Company, appellant, vs. The United States of America, The Interstate Commerce Commission, The Cincinnati, Hamilton & Dayton Railway Company, et al. Filed September 12th, 1911. File No. 22,856.

Supreme Court of the United States.

No. 788. OCTOBER TERM, 1911.

THE PROCTER & GAMBLE COMPANY, a corporation under the laws of Ohio,

Appellant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
KANSAS CITY TERMINAL RAILWAY COMPANY,
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellees.

Motion to Advance Cause.

GEORGE H. WARRINGTON,
Counsel for Appellant.

COURT JOURNAL PRINTING CO., 111 Main street, Cincinnati.

Supreme Court of the United States.

No. 780. OCTOBER TERM, 1911.

THE PROCTER & GAMBLE COMPANY, a corporation under the laws of Ohio,

Appellant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
KANSAS CITY TERMINAL RAILWAY COMPANY,
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellees.

Motion to Advance Cause.

The appellant, The Procter & Gamble Company, moves the court to advance this cause for hearing upon the docket for the reason that this proceeding is an appeal from a final judgment of the Commerce Court and under the terms of Section 2 of the Act of Congress creating the Commerce Court, approved June 18, 1910, appeals

from final judgments of said Commerce Court shall have priority in hearing and determination in this court over all other causes except criminal causes.

This appeal involves the validity of certain rules adopted by the railway companies, appellees herein, relating to demurrage charges upon private tank cars, and it is contended by the appellant that the enforcement of such rules by the railway companies deprives it of its property without compensation and without due process of law in violation of the Constitution of the United States and particularly of Article V in amendment thereof, and that said rules are in violation of the Act to Regulate Commerce and particularly of Sections 1 and 15 thereof as amended June 29, 1906. The Interstate Commerce Commission sustained the validity of these demurrage rules and its action was affirmed by the Commerce Court. This proceeding is brought to reverse the final judgment of the Commerce Court in this matter.

GEORGE H. WARRINGTON,
Counsel for Appellant.

(2

No. 780.

Supreme Court of the United States

OCTOBER TERM, 1911.

THE PROCTER & GAMBLE COMPANY,
Appellant,

versus

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
KANSAS CITY TERMINAL RAILWAY COMPANY,
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellees.

Brief for Appellant.

GEORGE H. WARRINGTON,
Attorney for Appellant.

COURT INDEX PRESS, 808 Main Street, Cincinnati.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 780.

THE PROCTER & GAMBLE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
KANSAS CITY TERMINAL RAILWAY COMPANY,
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellees.*

Brief for Appellant.

STATEMENT.

The appellant is engaged in the manufacture of soap and the refining of cotton seed and other oils and owns large industrial plants at Ivorydale, Ohio, Port Ivory, N. Y., and Kansas City, Kansas. In all of its plants it maintains private railroad tracks for

the purpose of switching cars to and from the interchange tracks connecting with the defendant railroads and between its various buildings. At Ivorydale and Port Ivory it owns its locomotives and performs its entire switching service. At Kansas City all inter-factory switching service is performed by one of the railroad companies under contract by which the appellant pays for it separately and apart from any transportation charges. The tracks in all cases are owned by the appellant, are on its own ground, and no railroad has any interest whatever in either tracks or ground.

The appellant owns 532 oil tank cars. These cars represent an expenditure of approximately $500,000 and it is admitted that the defendant railway companies have no right, title or interest whatsoever in them. It was necessary to purchase these cars for the transportation of oils, acids, greases and other commodities used by the appellant in its business for the reason that neither the defendant railroad companies nor any other railroad companies are prepared to furnish such equipment. These tank cars when loaded by the appellant are tendered to railroad companies for shipment and are hauled to destinations at the regular published rates for the commodity shipped. For the use of these cars, and in lieu of furnishing the cars themselves, the railroads allow the appellant ¾c for each mile they are carried in accordance with the published tariffs of the railroads governing the movement of private tank cars. No *per diem* or other payments are made. (Record, pp. 60-61.)

The railroads have never charged demurrage on private tank cars while standing upon private tracks

until the taking effect of the tariffs containing the demurrage rule complained of in this case. Under this rule the railroads are now charging and collecting from the appellant demurrage on its own cars after they have been delivered to it and are standing upon its own tracks.

After the publication and before the taking effect of these tariffs, the appellant brought proceedings before the Interstate Commerce Commission to enjoin the railroads from enforcing the rule in question upon the grounds that it was unreasonable and in violation of the Act to Regulate Commerce and the Constitution of the United States in that its enforcement would work an invasion of appellant's property rights. After a hearing at which there was no dispute as to the facts, the Commission dismissed the complaint.

The Procter & Gamble Co. v. *C., H. & D. Ry. Co., et al.*, 19 I. C. C. Rep., 556.
Record, pp. 13-18.

Thereupon the appellant brought an action in the Commerce Court to set aside and annul this order of dismissal and to secure the relief from that court which was denied by the Commission; after a hearing the Commerce Court on July 20, 1911, rendered a final judgment dismissing appellant's petition (Record, p. 87). The opinion of the court is printed in full in the record (pp. 80-87) and is reported in 188 Federal Reporter, 221. This appeal is taken from that judgment.

ARGUMENT.

Rule I of the demurrage rules reads as follows:

"RULE I.

"CARS SUBJECT TO RULES.

"Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

"(*a*) Cars loaded with live stock.

"(*b*) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

"(*c*) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

"NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)" (Record, pp. 9-10.)

The appellant objects to this rule in so far as it provides that private cars on private tracks are subject to demurrage and particularly to that part which provides that if private cars are returned to an industry under load, railroad service is not at an end until the lading is removed. This arbitrary definition of what constitutes railroad service for such cars permits the railroads to charge demurrage on loaded cars after they have been delivered by the carrier to the industry and withdrawn entirely from the railroad company's tracks. We contend that after such cars have been removed from the interchange tracks by the owner and placed on his private tracks they cease to be engaged in railroad service and become the private property of the owner to be used as he may see fit. The railroad has no interest whatever in the track on which the car is then standing. It has ceased entirely to pay any rental or mileage for the use of the car. It has no interest of any kind in the car, is not responsible for it in any way, and can have no interest in it again until it is placed on the interchange tracks and tendered for shipment. From that time the railroad company becomes responsible for the car and not before. Its responsibility ceases when it delivers the loaded car to the industry, and it can not be held liable for any damage that might happen to the car thereafter. The very bill of lading under which the shipment is made provides that the responsibility of the carrier ceases when delivery is made on a private siding and that the property is thenceforth at owner's risk.

See Uniform Bill of Lading, 14 I. C. C. Rep., 346-354.

The car and its contents become the private property of the owner after the delivery to him on his own tracks the same as any of his other property. The railroad company can not require the owner to place the car again in service until he sees fit. (Record, pp. 64-65-66.) The latter may destroy it if he pleases and it is not claimed that the railroad company would have any remedy. The owner pays all of the taxes on these cars and receives nothing from the railroad for their use except when they are actually in motion upon the railroad company's tracks.

The published tariff of all of the defendant railroad companies governing the movement of private tank cars reads as follows:

> "Rule 29. (Sec. 1.) In providing rating in this classification for articles in tank cars, the carriers whose tariffs are governed by this classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters (¾) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs."
>
> Record, p. 60.

The Interstate Commerce Commission has decided that interior switching within industrial plants is not railroad service; that the carrier's duty is fully discharged when the inbound car is placed on the inter-

change track, and that such duty does not begin as to the outbound car until it has been placed on the interchange track.

General Electric Co. v. *New York Central Ry. Co. et al.*, 14 I. C. C. Rep., 237.
Solvay Process Co. v. *D., L. & W. R. R. Co. et al.*, 14 I. C. C. Rep., 246.

See also,

Chicago & Alton R. R. Co. v. *United States*, 156 Fed. Rep., 558.

Demurrage has been defined repeatedly by the courts and the Interstate Commerce Commission; the following quotations from decisions of the Commission state these definitions as concisely as any we have found:

"Primarily demurrage is imposed by a railroad to compel prompt loading and unloading of cars. The Commission fully recognizes the right of a carrier to secure the fullest practicable use of its equipment, and to be recompensed for delays caused by the negligence and indifference of shippers and consignees. Such principle, however, does not carry with it by necessary implication the right to make a charge when no service is given. If the carrier paid a daily rental for the car, whether moving or not, it would clearly have the right to exact a payment for unreasonable delay on the part of the shipper or consignee; or if it furnished the track upon which the car stood, it might likewise, and properly, make a charge for the use of the track."

In the Matter of Demurrage Charges on Privately Owned Tank Cars, 13 I. C. C. Rep., 378.

Again:

> "The purpose of a demurrage charge, and charges of a kindred nature, is twofold. In the first place, they are imposed as compensation to the carrier for an additional service. The rate of freight includes a delivery of the property; it does not include the storage of the property after reasonable opportunity has been afforded the consignee to receive it. When, therefore, the carrier through failure of the consignee to promptly remove the property is obliged to store the same, either in its cars or its warehouse, it performs a service not embraced in the rate, and for which additional compensation may properly be exacted.
>
> "The demurrage charge is imposed in the second place as a penalty, to influence the shipper to promptly unload and release the equipment of the railroad."
>
> *New York Hay Exchange Association* v. *Pennsylvania Railroad Company et al.*, 14 I. C. C. Rep., 178-184.

It has been held uniformly that the carrier seeking to collect demurrage or other charges must have some property interest in the car or tracks. Here the railroads admittedly have no title or interest of any kind in appellant's cars or tracks and to hold that under such circumstances they may charge the owner rental for the use of his property while in his possession seems to us clearly an invasion of the rights of private property.

See

Miller v. *Ry. Co.*, 88 Ga., 563.
Wagon Co. v. *Ry. Co.*, 98 Ky., 152.

Erie Railroad Co v. *Waite*, 114 N. Y. Supp., 1115.

The last case makes the distinction for which we are contending by holding that a railroad entitled to possession of cars and liable to the owners thereof for a *per diem* charge for their use may charge demurrage for their detention. In our case there is no *per diem* charge, but merely one based upon mileage, which ceases when the car is delivered.

These definitions and rulings must be completely changed and revised if the decision of the Commerce Court in this case is to prevail.

If the imposition of demurrage charges would release private cars so that they could be immediately returned to the railroad and used as part of its equipment, there might be a justification for them; but it is not claimed that such charges do or can have this effect in such cases, as there is no obligation whatever upon the part of the owner of the car to return it to the railroad at all. Demurrage could only accomplish this purpose in such cases if it were imposed until the car is returned to railroad service. There is no attempt to do this; it is merely imposed until the cars are unloaded, after which they may be detained by the owner indefinitely. In other words, demurrage on private cars on private tracks fails entirely of its purpose to secure the release of these cars for railroad service. Instead of doing this, it merely imposes upon the owner the burden of promptly unloading his car when it can make no possible difference to the railroad company or the

public or other shippers, so far as securing the equipment is concerned, if the car is never unloaded, as the owner is not obliged to return it to railroad service until he sees fit; moreover, as will be shown later, neither the railroads, the general public nor other shippers are entitled to use these private cars in any event, as it has been held uniformly by the courts and the Interstate Commerce Commission that the owner of private cars is entitled to their exclusive use.

The owner may wish to employ his car for storage purposes. It sometimes happens that at certain periods of the year the appellant has no place for the storage of certain commodities except its tank cars. (Record, p. 72.) Under the rule in question there is no objection to its doing this without payment to the railroad company, provided only that it unloads the cars, notifies the railroad that they are unloaded, and then loads them again. What possible benefit can either the carrier or the public derive from imposing this needless and burdensome labor upon the owner? It is not claimed that the cars are thereby released for railroad service, for the owner may reload them and use them for storage purposes indefinitely. The evidence shows that a large percentage of cars must be held under lading from ten to thirty days to await the results of chemical analyses (Record, pp. 70-71); here the charges can not be avoided although they do not aid in the least in returning the cars to railroad service. Moreover, when they are in railroad service, they carry only the appellant's commodities—they do not serve the railroads or the public generally. (Record, pp. 23, 26, 37, 40, 64-5-6, 74.)

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN THIS CASE.

In the case above cited (In the Matter of Demurrage Charges on Privately Owned Tank Cars, 13 I. C. C. Rep., 378), the Interstate Commerce Commission held unanimously, as late as April, 1908, that demurrage charges can not be imposed upon private cars while on private tracks, and the reasoning of Commissioner Lane, in his opinion in that case, seems to us incontrovertible.

This decision has been overruled by the Commission in the present case and it may be well to examine the grounds on which it is based.

The Procter & Gamble Co. v. *C., H. & D. Ry. Co., et al.*, 19 I. C. C. Rep., 556.
Record, pp. 13-18.

The opinion quotes copiously from the report of the Committee of the National Association of Railway Commissioners which prepared these rules. It appears from this report that the rule in question was recommended on the broad ground that it would have the effect of adjusting inequalities between shippers who owned cars and those who used railroad cars. If such inequalities are to be adjusted by the railroads and the Commission they might with equal propriety attempt to adjust other inequalities such as those between car load and less than car load shippers, shippers who own private switches and those who do not and any other of the numberless inequalities which must exist between those who have the capital and enterprise to adopt modern methods of lessening the cost of production of commodities

and those who have not. We deny that it is any part of the function either of the railroads or the Interstate Commerce Commission to attempt to adjust any of these inequalities further than to see that they are not enhanced by advantages in transportation rates.

The report refers to the chaotic condition of the private-car problem and attributes it to the "exceedingly indefinite arrangements between carriers and shippers respecting employment of private cars." Just where there is anything indefinite in a published tariff which provides simply that owners of private tank cars shall receive ¾ cent for each mile they are hauled is not pointed out. The basis of the Commission's decision is that it would result in discrimination in favor of car owners to exempt these cars from demurrage charges while on the private tracks of their owners, "a plain violation of the requirement that he who ships or receives freight in a private car shall enjoy no advantage over him who is dependent upon railroad equipment."

It seems to us that this loses sight of the distinction between the shipper's rights as a shipper and his rights as an owner of private property. In the first place, it is the duty of the carrier to furnish equipment to the shipper. There is no attempt to do this in the case of tank cars and the shipper is thus forced to purchase or rent them himself or ship in barrels with railroad equipment. He receives an allowance for the use of his equipment which, according to the evidence in this case, is not sufficient to pay interest upon the investment, so that to the extent that these allowances do not repay him for the investment he is at a transportation disadvantage as

compared with the shipper who employs railroad equipment. (Record, p. 62.)

The private car owner does not ask for nor obtain lower rates than those who use railroad equipment. He does not demand "that private cars be accorded special privileges and immunities" so far as transportation is concerned. If he can obtain any profit indirectly by using his cars for some purpose other than the transportation of freight, such as for interfactory switching, storage, etc., he does not thereby obtain any *shipping* advantage over his competitor who uses railroad equipment. The advantage which he does obtain, if any, arises from his private ownership of cars which may be used for purposes other than shipping; there is no advantage so far as transportation is concerned; it is merely incidental to his ownership of private property which he does not choose for the time being to use in transportation. So long as this property is used in transportation he enjoys no advantage over other shippers. After it has ceased to be used in transportation we submit that he is entitled to any advantage from its use which he can obtain. The duty and power of the Interstate Commerce Commission cease when it has provided that one class of shippers shall enjoy no *transportation* advantage over another. Its duty and authority end when transportation ends.

The Circuit Court for the Western District of Missouri in the case of *F. H. Peavey & Co. et al.* v. *Union Pacific R. Co. et al.*, 176 Fed. Rep., page 409, at page 419 (recently affirmed by this court, 222 U. S., 42), uses language which is peculiarly appropriate to this question of discrimination. In speaking of the treatment of grain in elevators the court says

that the advantages derived by the owners of such elevators who are also shippers of the grain

"* * * are of the same nature as those which the owners of cars leased to a railroad company who are shippers of the articles transported therein may derive from that ownership.

"It is no part of the duty, nor is it within the power of the commission to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track, and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than one who loads it from a wagon.

"Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership, and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the commission's power.

"The truth is that trade advantages of this nature do not condition the questions of reasonableness of rates, of rebates, or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills, and by their use derives greater profit from the dealing in the articles which he ships over a railroad, is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which he renders that the shipper who owns less or no such trade facilities and derives less profit is entitled to. The

reasonableness of and discrimination by the charge and the compensation is conditioned by the reasonable value of the service, not by the gain or the loss which the shipper derives from the use of the trading facilities he owns in the handling of the articles transported. The pecuniary advantages that result to the owners of elevators, who are also shippers of the grain, from its treatment in their elevators, are derived, not from the transportation of the grain nor from its elevation or transfer in transit through their elevators, but from their ownership or their operative control of the elevators, and their use of them in the conduct of their trade."

As said by Mr. Justice Holmes in affirming the judgment in this case, 222 U. S. at p. 46:

"The law does not attempt to equalize fortune, opportunities or abilities."

The only case cited by the Interstate Commerce Commission in its opinion in this case is *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S., 452. It is cited as a decision of this court that the Interstate Commerce Commission has the power to require that private cars be taken into account by carriers in determining an equitable distribution of coal cars among shippers during periods of car shortage. In the first place, this proposition was not decided by this court, as clearly appears from a reading of the opinion of Mr. Chief Justice White. If it had been, however, we contend that it is not applicable to this case, as the right to use private cars is a matter separate and distinct from and not in any way dependent upon or affected by the

counting or failure to count such cars; moreover, the question decided in the Illinois Central case can only arise under conditions which do not exist in the present case; to-wit, the failure of the carrier to supply all the cars required by shippers during periods of car shortage.

Traer, Receiver, v. *C. & A. R. R. Co.,* 13 I. C. C. Rep., 457.

As said on page 458:

> "It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers."

Railroads furnish a sufficient number of coal cars to supply the shippers at all times except at extraordinary periods when a car shortage arises, as described by Mr. Chief Justice White on page 460 in the opinion in the Illinois Central case. The railroads do not supply any oil tank cars, so the question of counting private oil tank cars against the owners in determining their allotment of system cars in periods of car shortage can not arise for the simple reason that there are no system cars. It may be conceded that if conditions were the same in the cotton seed oil trade as in the coal trade, to-wit, that the railroads furnished a sufficient number of tank cars to accommodate the oil business at all ordinary times, the private cars of owners might be counted against their allotment of system cars in the extraordinary periods of car shortage, without affecting in any way their right to the exclusive use of their own cars. As will be shown later when we consider

the opinion of the Commerce Court in this case, the owner of a private car is entitled to its exclusive use in any state of the car supply. Moreover, oil tank cars are peculiar in that they can readily be used only for the shipment of a particular commodity, as, for example, cars used for the transportation of petroleum can not be used for cotton seed oil, those used for sulphuric acid are not suitable for glycerine, etc.

Under these circumstances we submit that the Illinois Central case is not even analogous to this case, much less decisive of it.

The Interstate Commerce Commission in its opinion in the present case on page 560 (Record, p. 17) uses this language:

> "Manifestly the law does not impose upon defendants the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both and which is stated definitely in defendants' tariffs."

We do not concede the validity of this premise. The railroads have held themselves out for years as common carriers of private cars and after so holding themselves out and thus inducing investments in such cars, we deny that they can now arbitrarily refuse to haul them. No case is cited in support of this proposition. If it were true and the railroads could refuse to-day to haul such cars they could at one blow destroy an investment of millions of dollars which the owners of the thousands of private cars in this country have made upon the faith of the railroads having held themselves out as common carriers to transport them and upon terms and condi-

tions that are just and reasonable. If they consider the allowance of three-fourths cent per mile for hauling such cars too much they might be at liberty to decrease this amount subject to the approval of the Interstate Commerce Commission as to the reasonableness of such decrease. We submit that they can not indirectly decrease this allowance under the guise of demurrage rules which attempt to impose a burden upon the owners of such cars which has nothing to do with their transportation. It should be noted that Section 15 of the Interstate Commerce Act expressly recognizes the right of the shipper to furnish his own cars and receive a reasonable allowance therefor:

> "If the owner of property transported under this Act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."
>
> *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., at p. 46.

If the premise of the Interstate Commerce Commission is correct, the railroads could impose numberless conditions, not upon the transportation of these cars but upon the uses to which they shall be put after they have been delivered to the owner upon his private tracks. They could decree that owners of private cars should present them to the railroad companies after they have been hauled a certain number of miles under the threat that if the owner did not accede to these conditions the company would refuse to haul his cars. The mere statement of such

a proposition seems to us a sufficient answer to it. It may be conceded that the railroad companies can impose reasonable conditions governing the transportation of these cars, but such conditions must have to do with their transportation, such as requirements concerning their proper equipment with brakes, safety appliances, etc. They must not interfere with the owner's right to use such cars as his own property after they have been delivered to him and are on his own tracks.

That a railroad is a common carrier of cars as well as of the freight which they contain we would refer to the case of *Peoria, etc., Co.* v. *Chicago, Rock Island & Pac. R. R. Co.*, 109 Ill., p. 135.

Here it was held that a railroad company as a common carrier of freight for hire is a common carrier of the freight cars of other companies as well as of the freight they contain, and that it is its duty to receive and haul freight cars of a connecting line and in case of loss of such cars it is liable as a common carrier in the same way as it is in the case of loss of ordinary freight. This case has been followed and cited with approval in the following cases:

Schumacher v. *Chicago & N. W. Rwy. Co.*, 207 Ill., at p. 205;

Mo. Pac. Rwy. Co. v. *Chicago & Alton Rwy. Co.*, 25 Fed. Rep., 317;

U. S. v. *Union Stock Yard Co.*, 161 Fed. Rep., at p. 924;

U. S. v. *Sioux City Stock Yard Co.*, 162 Fed. Rep., at p. 560.

The rule complained of here has recently been held invalid so far as concerns intrastate commerce in New York by the Public Service Commission for the Second District of that state in the case of *General Electric Company* v. *New York Central Ry. Co. and Delaware & Hudson Co.* The Commission in its decision as reported in the *Traffic World* of October 8, 1910, uses the following language:

> "That these carriers have no lawful right to enter upon the tracks of the General Electric Company beyond the interchange track for any purpose is beyond dispute; and it is well settled in law that the General Electric Company can not require of either respondent the performance of railroad service upon its industrial tracks. These considerations are conclusive upon the question at issue. Neither in fact nor in law does railroad service by the respondents extend beyond their interchange tracks with the General Electric Company. The right to collect car demurrage can not be predicated upon a fiction. Such right must arise from ownership, holding by agreement, and any extension of control through carrier's operation or carrier's liability. None of these extends to a loaded car delivered upon an interchange track to the car-owning company after removal by that company upon its own tracks by its own power from the interchange or place of delivery. Such a consignee having taken full possession and complete control, is entirely free from all interference by the carrier with the disposition of the car or the carload. It follows that the part of the demurrage code here objected to by complainant, so far as it relates to demurrage on private cars inbound under load to the industrial company owning the cars after removal of the loaded cars from the interchange or delivery

track, must be held unreasonable and without warrant of law.

"Even if upheld the rule is incapable of practicable enforcement, since the car and its lading after removal from the interchange track are in the exclusive possession and control of the industrial company, and obviously any requirement by the carrier of a report from the owning industrial company of the time of unloading as a basis for the assessment of demurrage charges could be successfully denied. This seems to be fully recognized in the demurrage rules themselves in the exemption from demurrage of the loaded private car outbound from the owning industry."

We would call the court's attention particularly to the last paragraph of this opinion stating the reason why the rule is incapable of practical enforcement; a reason which was recognized by the railroads in imposing demurrage charges on outbound loaded private cars only from the time they are placed on the interchange tracks, not from the time they are loaded. We are contending that the same rule be applied to inbound shipments.

The Decision of the Commerce Court in this Case.

It appears from the above that the Interstate Commerce Commission sustained the demurrage charges in question upon the broad ground that their imposition tended to prevent discrimination in favor of the owners of private tank cars. We have endeavored to answer this argument and it is to be noted that the Commerce Court in its opinion in this case sweeps

aside all of the reasoning of the Commission in sustaining the charges. This appears from the following quotation from the opinion of the Commerce Court, which will be found on pages 85 and 86 of the record, and in 188 Fed. Rep., 227-8:

"Baldly put, as an exaction for the use by the shipper of his own cars while standing on his own private tracks, the right to it might well be questioned. Neither is it to be sustained as compensation to the carrier for an additional service not covered by the transportation charge, that is to say, for the storage of the freight with which the cars are loaded, that storage being in the cars and on the tracks of the shipper and not in or on anything which the carrier has supplied. (*In re Demurrage on Private Tank Cars,* 13 Inter. Com. Rep., 378, 381.) It is difficult also to see how the imposition of demurrage on private cars for delay in unloading is necessary to prevent unjust discrimination, the shipper who is able to provide such cars having an advantage over those who can not, which this regulation is supposed to correct. The ability to own private cars is a mere matter of capital which the undue withholding or the prompt unloading and releasing of them can hardly affect, and the difference in financial circumstances is an advantage, which the law can not undertake in this way to overcome. (*Peavey* v. *Union Pacific Railroad,* 176 Fed., 409, 419.) It may not be consistent also with the exaction of this charge that provided only the cars are unloaded within the free time allowed, they may be reloaded and retained by the shipper indefinitely without any claim being made for demurrage. If this, which is the practical construction of the rule, is to be accepted as the correct one, it throws serious doubt on its validity, the real ground on which

the charge is to be sustained being the right of the carrier to have the cars promptly returned into service, which this has the effect to undo. Nor is the condition of the cars, once they have been delivered to the shipper, whether loaded or unloaded, of any concern to the carrier, except as an end to getting them back into use again. And there is also an apparent inconsistency in holding inbound cars liable to demurrage after they have been delivered and are on the tracks of the owner until they are unloaded, barring the free days, and yet in imposing it on the outbound cars without regard to when they are loaded, only from the time they are placed on the interchange tracks. The justification of the rule is therefore to be sought in something outside of all this, upon a determination of the real principle involved."

The court then proceeds to sustain the charges upon one ground alone, to-wit, that they are necessary in order to induce the owners to return the cars promptly to railroad service. This appears from the following quotation from the court's opinion on page 86 of the record in this case, and in 188 Fed. Rep., 228:

"It is not necessary to decide whether a railroad can refuse or be required to haul private cars. Whatever may be its duty in this regard, it is conceded that such terms may be imposed as a condition to hauling them as have a reasonable relation to the transportation service in which they are employed. And this concession necessarily sustains the present charge. In using these cars, whether as supplementary to or in place of their own, the railroads are entitled to require that there shall be a reasonably dependable supply, and that such cars shall not

be withdrawn at will to serve the private purposes of the owners, but shall be kept in active and steady use, and to that end that they shall be put on a footing in this respect with other cars. The interest of the carrier that this should be the case is clear. For the time being these cars become a part of the rolling stock of the road, taking the place of those which the carrier would otherwise be called upon to supply. It may be that there are some kinds of these cars, such as the tank cars here, which the railroads do not keep on hand, but rely on each shipper furnishing his own. But that does not change the principle involved. In one form or another, the carrier is bound to supply the necessary transportation facilities for handling every kind of freight. And this, not to one shipper only, but equally and without discrimination to all. And it is put at a disadvantage and an extra burden upon it imposed if it can not be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess, according as private cars are released or withheld. This the demurrage charge which is complained of is calculated to overcome, and therefore may justly be imposed. The purpose of demurrage is to force the cars back into use. Delay is made expensive, so that it may be an object to the shipper which he can not afford to disregard. Its exaction from private cars, the same as others, is therefore neither arbitrary nor unjust."

We submit that it is a complete answer to this argument if we can show that the imposition of these charges does not and can not have any effect upon returning the cars to railroad service. In the first place, it is admitted in the answers of the defendant

railway companies that the private oil tank cars of the appellant are not suitable for the transportation of commodities other than those used by the complainant. (Record, 23, 26, 37 and 40.) It further appears in the evidence that the railroads have not the right and have never attempted to exercise the right to use these oil tank cars for other shippers, or for the shipment of other commodities, and that they are not permitted to use them for any purpose other than the transportation of the owner's goods, and further that the railroads have never undertaken to exercise the right to order these cars into railroad service at any time (Record, 67). Furthermore, the courts and the Interstate Commerce Commission have decided repeatedly that the owner of even a private coal car has the right to its exclusive use, and we are not aware that this right has ever been questioned as to any kind of private cars.

In *United States, ex rel. Pitcairn Coal Co.* v. *Baltimore & Ohio Railroad Company et al.*, 154 Fed. Rep., 108, the Circuit Court held that the operators of coal mines along a line of interstate railway who own private coal cars are entitled to the exclusive use of such cars, and Judge Morris, at p. 114, uses the following language:

> "Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary, it is only just."

And on p. 115 he says:

> "The mine operator would in any state of the car supply continue to get the exclusive use of his individual cars as before."

The judgment in this case was affirmed by the Court of Appeals of the Fourth Circuit in 165 Fed. Rep., 113, and Judge Pritchard in delivering the opinion of the court at p. 120, quotes with approval the following language of the court below:

> " 'It would not be reasonable to hold that the exclusive use of individual cars by the mine operators under a system which has grown up during half a century and under which the trade has enormously developed, and upon the faith of which mine operators have invested millions of capital, often at times when the railroad company had neither money nor credit with which to increase the equipment, is now to be denied, unless it could be done upon fair terms mutually acceptable to the mine operators and the railroad.' "

It is true that this case was reversed by this court in 215 U. S., 481, but solely upon the ground that the complainant should have made application to the Interstate Commerce Commission for redress before applying to the courts.

The same ruling has been made by the Interstate Commerce Commission in the case of *Railroad Commission of Ohio* v. *Hocking Valley Rwy. Co.*, 12 I. C. C. Rep., 398, Commissioner Clark using the following language at p. 411:

> "We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars, that is, the lessees of these cars *should be given full and exclusive use of them*, but should not be given a division of the system cars except when the sup-

ply of so-called private cars and of foreign railway cars assigned to them is less than their proportion of the total available cars, including system cars, foreign railway fuel cars and so-called private cars."

This decision is cited by the present Chief Justice in the Illinois Central case, 215 U. S., at p. 463.

In the Illinois Central case the Interstate Commerce Commission again in effect made the same ruling as appears in the following language of the Chief Justice on page 465:

> "The general scope of the order was, however, qualified by expressly authorizing the railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered."

In other words, even under the emergency conditions of car shortage in the coal trade, the owner of private cars is not to be deprived of his right to use them to the exclusion of all other shippers.

When we consider the alternative to granting the owner the exclusive use of his car, his right to such use becomes even clearer. If he can not use his cars exclusively, the railroads could take them at any time and use them for their general business, and thus acquire equipment which they do not now possess at a very small cost, for it appears by the evidence in this case that the present charge falls far short of paying the interest upon the cost of these

cars. They could thus take private property without just compensation. The appellant did not purchase its private cars for the purpose of renting them to the railroads for general use as railroad equipment; its primary object was to secure equipment for its own use which the railroads did not supply. It is not in the car loaning business, but has been forced to secure cars and operate them at a loss so far as transportation is concerned because the railroads have failed to supply them. To deny to it now the exclusive use of its cars would be equivalent to holding that the shippers of the country must dedicate their cars to the railroads without just compensation and would mean the destruction of a vast amount of private property.

If the owner is entitled to the exclusive use of an ordinary coal car the reasons are much stronger for applying the same rule to the owners of private oil tank cars in view of the very limited and special uses to which they can be put. We take the liberty of citing the opinion of a practical railroad man as to the peculiar status of private oil tank cars as it appears in the "Proceedings of the Sub-Committee on Car Service and Demurrage of the National Association of Railway Commissioners" at Washington, June 4th and 5th, 1909. On page 24, Mr. A. B. Starr, General Superintendent of Freight Transportation of the Pennsylvania Railroad, said:

> "I wish to differ from some of the railroad opinions that have been presented in regard to the tank car for the reason that, in my judgment, the tank car stands in a position peculiar to itself. There is absolutely no return broadly speaking for a tank car. It is a part of home

equipment of the refiner and if he elects, as he very frequently does, to ship a tank load of oil and sends it to a consignee and permits that consignee to use that car for a store house for a day or a week or a month, the railroad does not care because it does not decrease the railroad's business one iota. We could not increase our business by one car load by putting restrictions on the tank car. With any other individual car the case is entirely different because they are and can be used for the general railroad business."

The Interstate Commerce Commission also distinguishes between the private oil tank car and other cars, recognizing that the tank car is an instrumentality in which the public has and can have no interest, its use being entirely confined to its owner whose goods it transports.

> *In the matter of Demurrage Charges on Privately Owned Tank Cars*, 13 I. C. C. Rep., 378.

If the owner of cars is entitled to their exclusive use, and they can not be used by other shippers, it follows that the railroad companies can have no possible interest in drawing them back into railroad service by the imposition of demurrage charges. The cars will be placed in railroad service when the owner has freight to ship, and not before. The railroad is not put "at a disadvantage and an extra burden upon it imposed if it can not be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess according as private cars are released or held," as Judge Archbald says, for the very simple reason that it is not

entitled to depend upon private oil tank cars for the general freight business of the railroad. Their prompt unloading can have no effect upon their return to service as, if there is no freight for shipment, they will simply remain idle on the owner's tracks. Moreover, as demurrage is not imposed under the rule complained of until the car is returned to service, but only until it is unloaded, after which it may be kept out of service indefinitely, the rule must fail of the purpose for which the Commerce Court says it was intended. In short, if these cars could be used as ordinary freight cars by the general public, and indiscriminately with other cars, there would be force in Judge Archbald's contention that some means should be adopted to expedite their prompt return to service; as, however, these charges can not have this effect, the reason for their imposition under the opinion of the Commerce Court fails, and they should be abolished.

We respectfully submit that the judgment of the Commerce Court be reversed and that the order of the Interstate Commerce Commission be set aside and annulled, and that the defendant railroad companies be enjoined from continuing in force the demurrage rule complained of, and that they be required to pay to the appellant the amounts collected from it under this rule.

GEORGE H. WARRINGTON,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 780

THE PROCTER AND GAMBLE COMPANY, APPELLANT,
vs
THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, HAMILTON AND DAYTON RAILWAY COMPANY, ET AL., APPELLEES.

BRIEF FOR APPELLEES THE CINCINNATI, HAMILTON AND DAYTON RAILWAY COMPANY, THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY.

EDW. BARTON,
Attorney.

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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911.

No. 780.

THE PROCTER AND GAMBLE COMPANY
Appellant,

VS

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, HAMILTON AND DAYTON RAILWAY COMPANY, ET AL.
Appellees.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE CINCINNATI, HAMILTON AND DAYTON RAILWAY COMPANY, THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY.

I.

STATEMENT OF ESSENTIAL FACTS.

The fundamental question involved is whether the regulations of the several defendant railroad companies as to the assessment of demurrage charges on private cars on private tracks are valid.

Those charges are made in accordance with the tariffs of the several carriers, which are substantially if not literally the same in the respect under consideration.

Local Freight Tariff No. 5049-A of The Cincinnati, Hamilton and Dayton Railway Company, effective April 1, 1910, I. C. C. No. 2460, is printed at pages 9 to 12, inclusive, of the record. Rule I is as follows:

Cars Subject to Rules

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purposes, are subject to these demurrage rules, except at follows:

(a) Cars loaded with live stock.

(b) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

(c) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

Note—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. *Private cars under lading are in railroad service until the lading is removed and cars are regularly released.* Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; *if returned under load, railroad service is not at an end until the lading is duly removed*).

The carriers have in force a regulation in accordance with which three-fourths of a cent per mile is paid for the use of private cars, the same being Rule 29 of Official Classification No. 35, effective January 1, 1910, to which allusion is made at page 78 of the record, and which is printed in

full as part of the testimony offered by The Procter and Gamble Company, at pages 60 and 61, as follows:—

Rule 29. (Sec. 1). In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are governed by this Classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters (¾) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

(Sec. 2). Private tank cars will be moved empty without charge, at the time movement is made between stations or junction points on the lines of carriers whose tariffs are governed by this Classification (either individually or jointly), including delivery to connecting lines, subject to the following conditions:

(a) Should the aggregate empty mileage of any owner's cars on June 30th of each year, or at the close of any such yearly period as may be mutually agreed upon, exceed the aggregate loaded mileage on the lines of such carriers individually (or jointly when mileage accounts are computed jointly), such excess must be paid for by the owner, either by an equivalent loaded mileage during the succeeding six months, or, at tariff rates, plus the mileage that has been paid by the carriers to the owners on such excess empty mileage. Any excess of loaded mileage over empty mileage of any owner's cars at the end of the accounting period will be continued as a credit against the empty movement of such cars for the ensuing twelve months.

(b) Private tank car owners must assume responsibility for any excess empty mileage resulting from improper delivery of their cars by connecting lines.

(c) New cars or newly acquired cars, moved empty to home or loading point by order of the owner, must be billed at regular tariff rates.

It was stipulated between the plaintiff and the railroad companies that the evidence offered before the Interstate

Commerce Commission might be printed and submitted as the testimony to be considered by the Commerce Court.

The Procter & Gamble Company has every variety of arrangement for use of cars handled on its account.

On pages 58 and 59 of the record, it is shown that the plaintiff owned at the time the proceeding was commenced before the Commission four hundred and thirty-two (432) tank cars, and at the time of the hearing five hundred and thirty-two (532), it having purchased one hundred (100) in the interval. In addition to these (pages 74 and 75), it holds under lease from the Kansas City Southern Railway Company and the Los Angeles and San Pedro Railroad Company fifty-five (55) cars which are in service, twenty-five (25) being leased from the Kansas City Southern Railway and thirty (30) from the Los Angeles and San Pedro Railroad Company. Cars are likewise leased on occasion from "various private car owners" (74*). Where the cars are owned outright, the plaintiff receives for their use three-fourths of a cent per mile, as provided in Rule 29 above quoted. The same is true as to those held under lease, it being asserted (page 74, near top) that The Procter & Gamble Company gets the exclusive right to the use and control of its leased equipment. It pays to the owners a rental which may be greater or less than the mileage earned. Mr. Buchanan, an officer of the plaintiff, said (page 74):—

> We get credit for mileage. If we pay $35 a month for mileage and the car earns a mileage of $10, we only pay the difference.

Further explaining the matter, Mr. Buchanan said—page 74:—

> You understand that mileage is not paid to us, but to the car owner, and we take that up with him, not with the railroad. We do not negotiate with the railroad at all. A majority of our cars that are leased are rented for a long period, and we stencil on the cars, "For the use of The Procter & Gamble Company." Thus we get whatever benefit that might give us for prompt movement.

* References are to pages of the printed record in this court.

There may possibly be at times a difference in the arrangement where the cars are leased from another carrier and where they are leased from a private owner. This is illustrated by the following from pages 75 and 76 of the record:—

Commissioner Clark: When you lease them from a railroad company, do you pay substantially the same rental that you do to a private company for the same kind of a car?

Mr. Buchanan: We have that question up now. Yes sir. You mean as to the costs?

Commissioner Clark: Your rental.

Mr. Buchanan: Yes, sir; we pay the same thing. They get a per diem instead of mileage. We have not yet come to exact terms with them, I think.

Commissioner Cockrell: What is the per diem?

Mr. Buchanan: 25 cents a day, my recollection is.

Commissioner Clements: How long have you rented from the two railroads?

Mr. Buchanan: We have just recently rented them: we have not yet completed all the negotiations.

Mr. Warrington: How recently?

Mr. Buchanan: Within 30 days. We have not got all of them as a matter of fact, yet.

Mr. Warrington: And when you say a per diem, do you mean to say you pay the railroad—

Mr. Buchanan: No, sir. The railroads pay the railroad owning the car a per diem. Those are not cars of private ownership. They are railroad ownership, and they are paid a per diem instead of a mileage.

Mr. Warrington: And there is no claim on them, for the release of those 55 cars, is there, that they should not be subjected to the demurrage rules set forth here?

Mr. Buchanan: Nothing at all.

Mr. Warrington: The whole case here which we have made is with reference to cars of private ownership which this company receives a mileage on and has no reference to cars on which it receives a per diem.

It was further shown that the carriers do not furnish such tank car equipment as the shipper appears to need. For illustration, at page 76, there is this:—

Mr. Warrington: One more question. Do any of these defendant companies in these two proceedings furnish tank cars as part of their equipment?

Mr. Anderson: I have never heard of any of those companies owning tank cars. They have never furnished us with any.

Commissioner Clark: They have never furnished you cars for the shipment of your commodities?

Mr. Anderson: They never have.

Mr. Warrington: And you had the alternative of either purchasing or leasing the cars or shipping in barrels?

Mr. Anderson: Or shipping in barrels; and the cost of barrels is very excessive these days, and makes that prohibitive.

It is thus shown that there are all shades of ownership and control of cars on the part of The Procter & Gamble Company, from that of absolute ownership to that of mere temporary lessee of the tank cars of another railroad company, and all sorts of arrangements with the carriers as to the use of the equipment and the amount and basis of compensation for such use.

A similar variety of conditions exists with respect to allowances for switching and to the tracks and their use by the plaintiff and the railroad companies respectively.

(a) *At Port Ivory*, the tracks at the plant of The Procter & Gamble Company connect with those of The Staten Island Rapid Transit Railway Company by an interchange track, which is about a quarter of a mile from the end of the plaintiff's property line. At this place the plaintiff owns one locomotive (57-58). The locomotives of the railroad company do not enter its grounds, but the plaintiff delivers and receives by its own motive power from the interchange track, and no allowance is made for switching (58).

(b) *At Kansas City*, the plaintiff owns from twenty-five to thirty acres, and has a connection with the Kansas City Southern, the Connecting Belt Railroad and the Rock Island.

Under a recent agreement the Rock Island performs all the switching (delivers and receives) as a joint agent for the other two roads.

The Procter and Gamble Company has "no engines and receives no terminal allowance there." (58).

(c) *At Cincinnati* (p. 53), track connection is made with four railroads, the Baltimore and Ohio Southwestern, the Cincinnati, Hamilton and Dayton, the Cleveland, Cincinnati, Chicago and St. Louis, and the Norfolk and Western, all of which are defendants herein. The plaintiff has some seven and three-tenths miles of private track located upon its own property, and performs its own switching service, operating three switching locomotives at Ivorydale (Cincinnati). It takes the cars from the interchange tracks outside the plant, which tracks (except in the case of the Baltimore and Ohio Southwestern Company, as to which a certain part of the interchange track is on property of the plaintiff) *are owned by the railroad companies, which run up to the property line of the plaintiff* (53). The tracks between the interchange track and the property line of the plaintiff are used as connection tracks. It is the locomotives of the plaintiff that take the freight from the interchange track. As Mr. Buchanan says—record, page 54:—

> We operate under an agreement with the railroads on those interchange tracks; and place or receive those cars on those tracks.

The tracks of the plaintiff company at Ivorydale (Cincinnati) "can be used as detour tracks or interchange tracks," but are so used infrequently (54). The locomotives of the railroad companies are not allowed in the yard. The demurrage is assessed against The Procter and Gamble Company, the defendant companies disregarding in this respect The Ivorydale and Mill Creek Valley Company, but treating the same as a plant facility of The Procter and Gamble Company (55). For the purposes of the question involved in this case, The Ivorydale and Mill Creek Valley Company may be eliminated from consideration, being in effect The Procter and Gamble Company (55-56). At page 57 of the record the following question

and answer were put and given by Chairman Knapp and Mr. Buchanan respectively:—

> Question: I infer, then, that The Ivorydale & Mill Creek Valley Railway Company is treated by these defendant roads as a plant facility of The Procter & Gamble Company, and delivery of cars to the tracks of that switching road is regarded as a delivery to Procter & Gamble.
>
> Answer: Substantially so.

The switching allowances are an important element in the case.

At Ivorydale the plaintiff operates three switching locomotives (53) and about thirty-five or forty cars that are never used except about the plant and within the enclosure (54). For moving cars to and from the interchange track at this place The Procter & Gamble Company receives "an arbitrary of $3.50 for each loaded car in and each loaded car out" (54 and 63), the total receipts of plaintiff for this service amounting to about seventy thousand dollars a year (54).

This allowance of $3.50 on in-bound and out-bound loaded cars previously or subsequently moved by the railroad companies over their lines is paid by the defendants to the plaintiff (through The Ivorydale and Mill Creek Valley Company), and the service is the hauling of the cars either loaded or empty between the interchange tracks and the designated parts of the Procter & Gamble Company plant; and this service, says Mr. Buchanan (68, near top), is one which the railroad companies would otherwise perform themselves. He adds that they do it at Kansas City and at numberless places for other industries, but that it would be difficult for carriers to operate their cars in the plant at Ivorydale (68). Forty-eight hours free time is allowed (63, near bottom), which begins to run from the time in-bound cars under load are placed on the interchange track. In other words, in-bound loaded cars are assessed demurrage for every day they remain under load after being placed on this interchange track, and irrespective of whether they remain there or are taken into the plant of The Procter & Gamble Com-

pany, although as a practical matter they are promptly moved from the interchange track, so that the charge is made for detention under load on the tracks of the plaintiff. The railroads neither own nor operate anything beyond the interchange track (53). As suggested by Commissioner Clements in a statement which Mr. Buchanan pronounced correct:—

> The cars and engines and crews of The Ivorydale & Mill Creek Railway [The Procter & Gamble Company], after the Mill Creek Company takes them in, some go to one portion of the plant and some to another; they are first sent to one place, and then when the product is in a better state of development and manufacture, the cars take it around to another, and so on around about through the whole process of manufacture (57).

As soon as the cars are unloaded, demurrage charges cease. Upon this subject the following appears in the record at page 72, near bottom:—

> *Mr. Warrington*: Would it be any considerable burden or labor upon your company to unload these cars you intend to use for storage purposes; then notify the railroad company that they are unloaded and so under their rules free from demurrage; and then reload them again for storage purposes?
>
> *Mr. Anderson*: It would entail an expense. The expense of pumping such material as we get in tank cars is approximately five cents a hundred pounds. In order to relieve these cars from demurrage you could simply pump the contents into some small tank and then load it right back into the tank cars. The expense of that operation would be about five cents a 100 pounds. And thereby, legally, these cars would be released at once from demurrage charges.

At page 73:—

> *Mr. Warrington*: Would that process release these cars for railroad service again immediately?
>
> *Mr. Anderson*: It would not.
>
> *Mr. Warrington*: Because you would go on using them for storage?
>
> *Mr. Anderson*: Yes, sir; and load back the material into the cars until we wanted it for such purpose as it was intended.

The charge of three-fourths of a cent per mile begins and ends at the interchange track (62, near top).

The ownership of the contents of the cars varies.

The property received at the several plants of The Procter & Gamble Company is generally that of the consignee, "subject to an adjustment, awaiting the result of test and analysis" (77, near top). The Procter & Gamble Company generally pays the freight from point of origin, but the shipment is received subject to inspection involving the right to reject, in which event "the shipper pays the freight" (77).

II.

THE USE OF PRIVATE CARS AND THE ORIGIN OF THE RULE IN QUESTION.

Whether demurrage charges may be assessed on private cars on private tracks has been the subject of a great deal of consideration by administrative tribunals. The Public Service Commission of New York, in a case decided September 29, 1910, took the view that such charges could not be sustained.

> In Re Complaint of The General Electric Company vs. The New York Central & Hudson River R. Co. and The Delaware & Hudson Co. as to Demurrage Rules, Volume II of Reports of Public Service Commission of New York, page——

The Interstate Commerce Commission was originally of the same impression.

> In the Matter of Demurrage Charges on Privately Owned Tank Cars, 13 Interstate Commerce Reports, 378, being Case No. 933, decided April 13, 1908.

See also Conference Rulings of the Interstate Commerce Commission, Bulletin No. 4, issued December 28, 1909, Rulings 121, 122 and 123, of November 14, 1908, and 222, of April 13, 1908. The subject is further considered in correspondence between members of the Com-

mission and others, as reported in 5 Traffic World & Traffic Bulletin, 139, 160 and 208-211. The rule in question was adopted by the railroad companies on the recommendation of the National Association of Railway Commissioners. 5 Traffic World & Traffic Bulletin, 160.

An account of the historical develompent of the use of private cars and a statement of the practices now in vogue is to be found, with bibliographic references to other authorities, in Volume I of Johnson & Huebner's treatise on Railway Traffic and Rates, pages 212 to 239, inclusive, published in 1911. See also the remarks of Commissioner Harlan in Ruttle v. Pere Marquette R. Co., 13 Interstate Commerce Reports, 179, at 185.

Section I of the Interstate Commerce Act as amended June 18, 1910 (36 United States Statutes at Large, 544-5), provides in the second paragraph:—

> The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof . . . . . and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

III

ARGUMENT.

It is desired to submit on behalf of the railroad companies three lines of argument in justification of the tariff rule that has been assailed.

1. The rule is reasonably necessary and proper to prevent unjust discrimination.

2. A carrier can not be required to use private cars as a part of its equipment and at the same time denied the right to prescribe reasonable terms therefor in order to produce stability and reliability as to its car supply.

3. The contention of the plaintiff that it is not liable for demurrage charges is directly inconsistent with its claim to be allowed switching charges, and the latter not being assailed or questioned in this proceeding, it follows that the demurrage charges can not be questioned.

So much that may be said in support of either the first or the second of the above propositions tends likewise to support the other, that we shall treat of the two together. The opinion of the Interstate Commerce Commission (19 Interstate Commerce Reports, 556) proceeded mainly upon the first ground, while that of the Commerce Court (188 Federal Reporter, 221) was based rather upon the second. The subject matter of the third was gone into very fully by the Commissioners themselves at the hearing, but was not dwelt upon either in the opinion of that tribunal or by the Commerce Court.

1 and 2. It being the statutory duty of the carriers to furnish cars, no shipper is under a legal necessity of supplying his own. Whether a railroad company may be required to transport cars under load as freight, charging for them as such, is not involved in this case. For The Procter & Gambel Company supplies equipment to be used by the railroad companies as their own, for the conduct of their own business. The freight transported is charged for at the published tariff rates. The cars are leased at three-fourths of a cent per mile, which is charged irrespective of whether they are empty or loaded (67).

A carrier may be the sole and absolute owner of its equipment, or it may lease it for a term of years or months, or for a shorter period which may be limited even to a single trip. It should be free to make any reasonable contract, and if, considering the interest of all its patrons, it determines that a contract on a mileage basis should be supplemented by a demurrage regulation which will have a tendency to keep the cars in use, and steady the supply, there can be no reasonable ground for complaint so long

as the *total* charge is not excessive. The plaintiff seeks to divorce the demurrage from the mileage charge. It asserts the right to dictate that its cars shall be used and on what terms. If it may demand that the carriers shall use them at the rate of three-fourths of a cent per mile, loaded or empty, then it may insist that they shall be rented by the month or year, or upon such other terms as to it may seem proper. There is nothing in this record indicating that the rule as to demurrage *when applied in connection with the charge of three-fourths of a cent per mile* operates to the disadvantage of the shipper, unless it be the suggestion that the amount as rental is inadequate. But if that is true, and if the shipper has the right to demand that its cars shall be rented for a reasonable *total* allowance, then there is ample provision under the statutes for securing a higher compensation.

The railroad company supplies the roadbed, track, bridges, crew and engine, and The Procter & Gamble Company leases its cars, for a common purpose—the transportation of interstate commerce. While thus engaged, the roadbed and all the equipment and all the employes engaged in operating a train are employed in a common public service. *The plaintiff has devoted its cars to a public use.* It has supplied a part of the equipment of a common carrier, thus leading the carrier to depend upon the same. It is of vital interest that the car supply be steady and reliable. It is not, as an abstract proposition, essential that demurrage charges be assessed on any equipment. The rule involved in this case (page 2 above) provides in terms that "cars loaded with live stock" and certain others shall not in any case be subject to demurrage charges. But carriers in the transaction of their business have found that unless this be done with respect to some classes of cars the supply needed for the general public may become irregular and uncertain, and inequalities will result. To the extent that it has seemed wise so to do in order to prevent injustice, demurrage rules have from time to time been promulgated and amended. Absolute equality is an impossibility.

The car may be on the private tracks of the shipper or of the consignee. It may be the private car of the shipper on the public track of the carrier at destination, or the private car of the shipper on the private track of the consignee. It may be a car leased by the shipper from another railway, as is true with respect to fifty-five of those to which reference is made in this record. Or it may be one leased from a car supply or car manufacturing company. The shipment may be one that is owned by the consignor, or may belong to the consignee or to a third party. The title as between consignor and consignee may pass at the place of origin or at that of destination. If the car be one belonging to a car manufacturing or supply company, that company may make arrangements of its own as to demurrage charges at point of origin or destination, and thus become in a measure a competitor of the carrier, and this, too, under the claim that it is not subject to the regulations of Congress applicable to common carriers.

Administrative tribunals which have had this subject under consideration and studied it in all its phases, have arrived at the conclusion that in view of all these varying conditions, the rule assailed is essential to prevent unjust discrimination; and such is the basis of the decision of the Interstate Commerce Commission in the instant case —The Procter & Gamble Co. v. Cincinnati, Hamilton & Dayton Ry. Co. et al., 19 Interstate Commerce Reports, 556, quoting at 559 from the proceedings of the National Association of Railway Commissioners, composed of a representative from each state that has a Railroad Commission, and a member of the Interstate Commerce Commission. Those proceedings are published in full in the report of the twenty-first annual convention of the Association (held in 1909) and in Volume 4 of the Traffic World and Traffic Bulletin, at pages 506 to 520, inclusive, where the reasons are stated which led the Commissioners to decide that some such rule was essential. See particularly pages 510-511, under the heading, "Private Cars." We print as an appendix that part of the report relating to this subject.

In Interstate Commerce Commission v. Diffenbaugh, 222 United States, 42, it was held, modifying and affirming the judgment of the Circuit Court (176 Federal Reporter, 409) in the so-called Peavy case, that a ruling of the Interstate Commerce Commission forbidding the allowance of compensation for elevation services was unauthorized; in other words, that the owner of the elevator is entitled at least to the cost of the service he renders in the interest of the carrier.

This case involves no such question. The Procter & Gamble Company asserts the right to lease its cars at three-fourths of a cent per mile, loaded or empty, and to have the agreement of lease absolutely terminated the instant in-bound cars reach the interchange track. The railroad companies, finding it necessary or expedient so to do in order to prevent discrimination, and in some measure to make constant the number of cars in their service to meet a fluctuating demand, decline to accept the equipment upon such terms, but insist that it shall be deemed in railroad service until unloaded. Were the cars rented by the year, no question could be raised. The fact that the shipper was the ultimate owner of a car and the carrier only a bailee for a stated term, would have no effect on the right to assess demurrage on the cars on privately owned tracks. *The two rules amount only to a fusion of the mileage and term rental basis.* If the shipper, taking into consideration this rule and the expense which must be incurred in unloading the car to free it from the demurrage charge, receives inadequate compensation, the remedy is by insisting upon an increase over and above the three-fourths of a cent; or, in the alternative, by insisting that the carrier shall furnish all equipment that is needed, which it is bound in law to do, and for a reasonable compensation.

It has been urged that the rule of the carriers is impracticable of enforcement, because they can have no means of telling when the cars are unloaded, since the agents of the carriers have no business on the private property of the consignee. This begs the question. The carriers make delivery on the property of the consignee. At Kansas City they do this through the Rock Island Company, and at

Cincinnati they do it for $3.50 per car paid The Procter & Gamble Company as their agent for that purpose. If the carrier may not be required to receive as a part of its equipment cars of a private individual for use in moving his own or other people's freight except upon terms to be agreed upon between the carrier and the car owner, then certainly one reasonable term of the agreement may be that the carrier shall have the right to trace the car as long as the same is under load. And if that involves going upon the owner's premises, then the carrier through its agent may go there to ascertain what is the fact.

The carrier can not demand that the shipper shall furnish equipment on any particular terms or at all. Why, then, should the shipper insist that the carrier shall receive the same on terms to be prescribed solely by the shipper? The statutory obligation to furnish all necessary tranportation facilities, including cars, necessarily implies the right of the carrier to fully equip itself for all business, and therefore to refuse to handle private cars at all, unless it be to transport them as freight—a proposition not involved in this proceding, although it may be noted that tariffs are in effect governing the hauling of locomotives and all kinds of cars *as freight*, 21 Interstate Commerce Reports, 103, 106, where a tariff schedule for the movement of cars as freight is in part printed. If, then, the railroad companies may refuse absolutely to receive private equipment, to be used with or as its own in hauling freight for others, or for the car owner, certainly it would follow that they may prescribe reasonable terms for its use, and that one of the conditions they impose may not be assailed without taking into consideration at the same time all other conditions, and may not be overthrown without a showing that the conditions, taken in their entirety, are in contravention of the law. The present rule may be found not to go far enough, and it may become a business necessity for carriers to discontinue paying for the use of private cars on a mileage basis, but instead to rent them for stated terms.

The Interstate Commerce Commission has reviewed the rule and has found it to be fair and just. *The problem*

is administrative no less than strictly legal, and the decision of the Commission should in such a case be taken as final.

The requirement that in order to be free from the rule as to demurrage the cars must be unloaded, has a *tendency* to keep the equipment of the shipper in motion and thus make steady and reliable the supply of cars available by the carrier for general use. See page 9 above.

This court has decided in the coal car cases—Interstate Commerce Commission v. Illinois Central R. Co., 215 United States, 452, and Baltimore & Ohio R. Co. v. Pitcairn Coal Co., 215 United States, 481—that the private cars of a coal owner may, if the Commission deems that proper to prevent discrimination, be counted in determining the equipment to which a shipper is entitled, and has decided that the jurisdiction of the federal authorities extends to all such instruments.

In Chicago & Alton R. Co. v. Interstate Commerce Commission, 173 Federal Reporter, 930, the point was made that some of the cars of the coal owners were not used at all in intersate business. As to this Judge Baker, before whom and Judges Grosscup and Kohlsaat the case was heard, said, speaking for the Court—page 932:—

> It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers cannot be required to take into consideration the cars of shippers who do only an intrastate business.
>
> Where federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local Constitutions, statutes, orders of Railway Commissions, and regulations of the carriers, all must give way.

Similarly in the Illinois Central case (215 United States 452), it was urged that coal bought by the railroad com-

panies was received at the mine, and so that cars used for its transportation were not engaged in interstate commerce. To this argument the court responded—pages 472-3:—

> When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine.

At pages 474-5:—

> It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its cars, are *instruments of such commerce.* From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.
>
> The corporation as a carrier engaged in interstate commerce being then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and *the instrumentalities employed for the purpose of such commerce, being likewise so subject to control,* we are brought to consider the remaining proposition, which is,
>
> Second. That even if power has been delegated to the commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.
>
> In view of the facts found by the commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the commission in this case, and which must be taken as true, as the cause was sub-

mitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of section 3 of the act to regulate commerce prohibiting preferences and discriminations.

Again at 477-8:—

> The right to buy is one thing and *the power to use the equipment of the road* for the purpose of moving the articles purchased *in such a way as to discriminate or give preference are wholly distinct and different things.* The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is bought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality.

In the light of the sentence last quoted, it may be conceded for the purpose of argument that there is some degree of inequality in the operation of the car demurrage rule. This must necessarily be so as to any such rule. Where the carrier owns both the track and the car, it is a discrimination to assess the same demurrage as where it is the owner of but one, the track *or* the car. If the rule is illegal with respect to tank cars, it must be so as to box or gondola cars. The accident that the cars of this particular shipper are adapted to use in its business does not affect the principle. If the contention of the plaintiff is sound, it must follow that a shipper of household furniture in an ordinary box car owned by himself may assess such demurrage charges as he sees fit while the car stands upon the private track of

a consignee waiting to be loaded home. There would be chaos if such practices were allowed to the extent that car owners could not be subjected to the rules properly deemed by the Interstate Commerce Commission necessary to prevent discrimination on the part of the cariers.

The principle in accordance with which the coal car cases were decided was rightly deemed by the Commission controlling here. Speaking for that tribunal, Commissioner Clark said—19 Interstate Commerce Report, 556, at 558:—

> There is no controversy as to the facts. Defendants argue that the demurrage rules as a whole have received careful and exhaustive consideration at the hands of those best qualified to pass upon them; that no obligation rests upon complainant to furnish cars, and that if he elects to do so, such cars must be subject to such reasonable rules and regulations as may be fixed by the carriers or the Commission, or by statute.
>
> In Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, it was held that this Commission has the power to require private cars be taken into account by carriers in determining an equitable distribution of cars among shippers.....
>
> Defendants contend, and with much force, that the decision of the Supreme Court above referrd to fully sustains the demurrage rule here complained of; that otherwise an industry having a supply of its own cars could insist that when such cars went on its private tracks they were entirely out of service and might not be considered as any part of the equipment, and it could therefore demand from the railroad company an additional supply of cars, contending that its own should not be treated as cars in commerce, but as buildings for storage, and, having so secured the desired equipment from the railroad company, it could again put its own cars into serviece, and thus defeat the operation of any fair rule for distribution of equipment.
>
> Defendants urge that complainant voluntarily provided itself with these cars; that it has put them into the service of the carriers under defendants' tariff rules which provide, on the one hand, for the payment to complainant of mileage on its cars, and, on the other

hand, for demurrage on said cars, and that complainant may not accept one provision of the tariff and reject the other.

Again, at page 560, Commissioner Clark said:—

Complainant goes further than to assert its right to be relieved from demurrage on its own cars when standing upon its own tracks within its own works, and asserts that a privately owned car while standing upon a privately owned track should be free from demurrage, even though the car were owned by one private interest and the track by another private interest. In other words, that owners of private tracks and owners of private cars should be permitted to exchange courtesies, and by mutual consent so relieve cars from demurrage rules of the carriers. It seems obvious that the acceptance and application of that theory would involve all of the elements of undue preference and unjust discrimination.

The rule which defendants apply to complainant's cars is the same as that applied to all other privately owned tank cars, and the only question seems to be whether or not the demurrage rule is a condition attached to the use of the privately owned cars, which defendants may lawfully maintain.

Manifestly, the law does not impose upon defendant the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both, and which is stated definitely in defendants' tariffs that they will use the privately owned cars and pay three-fourths of one cent per mile for such use, and will subject them to demurrage rules. Complainant, having its cars in use under those conditions, now asks that we relieve it from one of the conditions, which defendants are unwilling to relinquish.

We are of the opinion that defendants are within their lawful rights in establishing and maintaining the rule complained of.

Referring to the statement above that "the law does not impose upon defendants the obligation of hauling complainant's private cars," we again call attention to the circumstance, which Commissioner Clark doubtless had in mind,

that this is not a case where The Procter and Gamble Company is asking that its cars be hauled *as freight*, but is one in which plaintiff is insisting that the same be devoted to the use of the railroad companies at three-fourths of a cent per mile, and that nevertheless The Procter and Gamble Company may determine for itself what particular terms shall be prescribed for their use, and when that use ceases.

The case harks back to Munn v. Illinois, 94 United States, 113, in which the court said, at 126:—

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

The Ohio Supreme Court has gone to the extent of affirming that in order to prevent discrimination it may properly be required that one who furnishes private cars shall consent to their use by the general public. That court was aware—and this court will take judicial notice—that while the furnishing of private cars for use by common carriers may be proper, yet the danger of abuse is such that it should be hedged about by the most careful regulations. In State v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 47 Ohio State, 130, a case in which was involved the contention that there had been undue discrimination in favor of private car owners, the court said at pages 139-140:

> It was the duty of the defendants to furnish suitable vehicles for transportating freight offered to them for that purpose, and to offer equal terms to all shippers.....The fact that one shipper may be provided with vehicles of his own, entitles him to no advantage over his competitor not so provided. The true rule is announced by the Interstate Commerce Commission, in the report of the case of George Rice v. the Louis-

ville & Nashville Railroad Company et al. "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. v. Pratt, 22 Wall. 123), and then offer their use to everybody impartially." Page 50 of the report of the case. (Case No. 50, found in 1 Interstate Commerce Commission Reports, 503; s. c. 1 Interstate Commerce Reports, 722.) No doubt a shipper who owns cars may be paid a reasonable compensation for the use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodation to its other customers. It may be claimed that if a railroad company permit all shippers indifferently, and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in application to the actual state of the business of the country; for a very large portion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet, *the cars thus provided are to be regarded as part of the equipment of the road.* It being the duty of a railroad company to transport freight for all persons indifferently and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, *except upon condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose.* Were this not so, a mode of discrimination, fatal to all successful competition by small establishments and operators with large and more opulent ones, could be successfully adopted and practiced at the will of the railroad company and the favored shipper.

It will thus be seen that as long ago as 1890, the date of the opinion just quoted, the Supreme Court of Ohio recognized the dangers surrounding the use by railroad companies of private equipment. The order of the Commission in this case that cars thus devoted to public use shall be deemed in the public service until unloaded, stops far short of what the Ohio court declared would be proper when it said the carrier could not permit private cars upon its tracks at all, unless with the understanding that they might be used for the general public, if in no other way could undue discrimination be prevented.

It is no answer to say that the railroad company has no interest in the private cars on the private tracks. The fundamental proposition is that the public has an interest in the manner in which these private cars are used, and the sanction for this rule is to be found not in the protection of the interest of the railroad company, nor in that of the shipper, but in that of the general public. The fifty-five leased cars involved in this case are taken out of the general service of the common carriers of the communities through which the Kansas City Southern and Los Angeles & San Pedro Railways run, and devoted to the exclusive service of the Procter & Gamble Company, and are intermingled with the other five hundred and thirty-two. The logic of the argument for the plaintiff is that The Procter & Gamble Company may construct its own cars, or buy them from a common carrier or car manufacturer, or lease them from such carrier or manufacturer, and thus take out of the general railway service the number so leased, and devote them exclusively to its own use upon such conditions as it may deem proper, even although that may materially affect the stability of the supply of equipment to the prejudice of other shippers.

The question whether this rule is essential or proper in the regulation of the busines of the railway companies is one of fact, whose determination by the Commission is not the subject of review by the courts. Interstate Commerce Commission v. Delaware, Lackawanna & Western R.

Co., 220 United States, 235, 251, and Baltimore & Ohio R. Co. v. Pitcairn Coal Co., 215 United States, 481, there cited.

If it be true that the enforcement of this rule is essential to prevent discrimination, and if it be also true that to a certain extent it impairs the rights of The Procter & Gamble Company with respect to its private property, and limits its power to contract respecting the same, then since the authoriy of Congress with respect to interstate commerce is supreme, the plaintiff must submit to such impairment. It can make no contract with respect to the three-fourths of a cent per mile allowance or as to any other compensation for the use of its cars, save what may be found in the published tariffs of the railroad companies and sanctioned by the proper order of the Commission, if the same be attacked. Armour Packing Company v. United States, 209 United States, 56. If in order to the complete exercise of its power over commerce, the use of private cars should be entirely forbidden, then Congress may enact a law to that effect, even although it would result in the destruction of the entire value thus represented. Lottery Cases, 188 United States, 321, 327, et seq.; Northern Securities Co. v. United States, 193 United States, 197, 335, et seq., and cases cited; Louisville & Nashville R. Co. v. Motley, 219 United States, 467, and Noble State Bank v. Haskell, 219 United States, 104 and 575.

In the last cited case (219 United States, 104 and 575), the bank insisted that to be required to contribute to a fund to protect creditors of other banks would deprive it of its property without due process of law. The court answered, at page 580, the last sentence but one;—

> The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state.

So the demurrage charges can be avoided by going out of the business of becoming partners—so to speak—as common carriers with the railroads, they furnishing crews, and engines, and tracks, and rails, and the plaintiff the cars.

3. *The position of the Procter & Gamble Company with reference, particularly, to its business at Ivory-*

dale (Cincinnati) is inconsistent with itself. It claims (page 8 above) that when inbound loaded cars are delivered to it at the interchange track they pass entirely from the dominion of the railroad company and are in the sole and exclusive charge of the plaintiff, and subject to no demurrage rules or regulations of the carriers. At the same time it receives through its subsidiary the Ivorydale & Mill Creek Valley Railway Company, three dollars and fifty cents per car—seventy thousand dollars per year—for moving these cars from the interchange track and placing them where it desires upon its own tracks within its plant. The only theory on which this three dollar and fifty cents allowance can be made is that the service is one pertaining to transportation, for which the carrier may properly pay and which The Procter & Gamble Company is rendering as an agent for the carrier, with its own locomotives, hauling its own cars, loaded with its own freight, in charge of its own employes, upon its own private tracks. The allowance of the three dollars and fifty cents per car is for service rendered not only upon the private tracks, but to a large extent within the fenced enclosure of The Procter & Gamble Company (page 53, near top; question by Commissioner Harlan and answer thereto). For the purpose, therefore, of receiving this allowance, the plaintiff concedes that the work of the carriers does not stop at the interchange track, but extends on into the plant enclosure. But for the purpose of being relieved from demurrage charges, it contends that the carriers have no concern with these same tracks within this same enclosure.

There is no thought in calling attention to this inconsistency of criticising the switching allowance, which may be claimed to have received the express sanction of the Interstate Commerce Commission in some of its very recent decisions.

Buffalo Union Furnace Co. v. Lake Shore & Michigan Southern Railway Co., 21 Interstate Commerce Reports, 620.

Manufacturers Ry. Co. v. St. Louis, Iron Mt. & Southern R Co., 21 Interstate Commerce Reports, 304.

But we allude to it as showing in the clearest manner the difficulties surrounding the whole situation, and the impossibility of prescribing any demurrage rules that will be free from criticism.

IV.

THE OPINION OF THE COMMERCE COURT.

It was the fundamental view of the Commission that the demurrage rule is essential to the prevention of discrimination, and to that Presiding Judge Knapp called especial attention in his concurring opinion as a Judge of the Commerce Court—Procter & Gamble Co. v. United States, 188 Federal Reporter, 221, 229. That court, however, speaking by Judge Archbald, relied more especially upon the necessity, or at least propriety, of such a rule in order to preserve stability in the matter of available equipment. We can not better state the conclusion of the Commerce Court, than by quoting from its opinion at page 228:—

> It is not necessary to decide whether a railroad can refuse or be required to haul private cars. Whatever may be its duty in this regard, it is conceded that such terms may be imposed as a condition to hauling them as have a reasonable relation to the transportation service in which they are employed. And this concession necessarily sustains the present charge. In using these cars, whether as supplementary to or in place of their own, the railroads are entitled to require that there shall be a reasonably dependable supply, and that such cars shall not be withdrawn at will to serve the private purposes of the owners, but shall be kept in active and steady use, and to that end they shall be put on a footing in this respect with other cars. The interest of the carrier that this should be the case is clear. For the time being these cars become a part of the rolling stock of the road, taking the place of those which the carrier would otherwise be called upon to supply. Cf. State v. Cin. N. O. & T. P. R. R., 47 Ohio St. 130, 23 N. E. 928. It may be that there are some kinds of these cars, such as tank cars here, which the railroads do not keep on hand, but rely on each shipper furnishing his own. But that does not change the

principle inolved. In one form or another, the carrier is bound to supply the necessary transportation facilities for hauling every kind of freight. And this, not to one shipper only, but equally and without discrimination to all. And it is put at a disadvantage and an extra burden upon it imposed if it cannot be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess, according as private cars are released or withheld. This the demurrage charge which is complained of is calculated to overcome, and therefore may justly be imposed. The purpose of demurrage is to force the cars back into use. Delay is made expensive, so that it may be an object to the shipper which he cannot afford to disregard. Its exaction from private cars, the same as others, is therefore neither arbitrary nor unjust.

Nor is it violative of the owner's rights. It is simply a condition to the acceptance of his cars, which, for the reasons given, the carriers have found it necessary to impose, and with which therefore, he must expect to comply. *Presumably the use of these cars operates to his advantage, or he would not be at the expense of supplying them. But he cannot expect that the advantage shall be all on one side.* And it having been found by experience that demurrage on private, the same as public, cars is a necessary transportation regulation, which is justified on principle, the carriers were within their rights in imposing it by the rule in question, and it must therefore be sustained.

V.

THE JURISDICTION OF THE COMMERCE COURT.

The Interstate Commerce Commission and the United States, through their respective counsel, filed motions and submitted briefs and arguments in the Commerce Court upon the question of its jurisdiction, claiming there was no right to review the action of the Commission, and that there has not been, in a legal sense, any "order" made of which that court could take cognizance. Those questions will doubtless be presented in brief and argument by other counsel to this court. They have been passed over in this brief not only because other counsel will present them, but

because it is the desire of the defendant railroad companies to have the fundamental question involved determined once for all. They have adopted a rule which was recommended and urged upon them by the National Association of Railway Commissioners. They desire the judgment of this court as to whether that rule is right or wrong.

Respectfully submitted,

EDWARD BARTON,
Attorney for Defendants.

The Cincinnati, Hamilton and Dayton Railway Company, the Baltimore and Ohio Southwestern Railroad Company and the Staten Island Rapid Transit Railway Company.

Cincinnati, Ohio, January, 1912.

APPENDIX.*

The utterly chaotic condition in which we find the private car problem calls for a careful and dispassionate inquiry into fundamental principles. Beyond all doubt the present confusion is to be charged directly to what a distinguished railroad official naively terms "those exceedingly indefinite arrangements between carriers and shippers respecting the employment of private cars." It is a standing reproach to the railroad world that these contracts for the use of private cars should be so indefinite that the parties can dispute endlessly as to their terms. In this connection reference is made to the record of the public hearing, pages 15 to 32, inclusive. The situation would be ridiculous were it not so fraught with evil. Your committee is agreed that the carriers' regularly published tariffs should set forth in detail the terms under which private cars will be employed; they should expressly stipulate that private cars, while in railroad service, shall be subject to the same demurrage rules as the carriers' regular equipment. The adoption of such a course would mean the passing of this phase of the private car question and would bring incidental advantages outside the limits of our present inquiry.

The report made by the Committee on Car Distribution and Car Shortage to this association at its last session contained a review of the recent decision touching car distribution in time of shortage. The position taken by the courts and the Interstate Commerce Commission was epitomized as follows: "It is the carrier's duty to furnish all facilities of transportation, and it cannot permit the presence of any equipment upon its lines to work a discrimination as between shippers."

* Reprinted from report of National Association of Railway Commissioners, recommending the adoption of the rule assailed. See page 14 above near bottom.

That this is, and ought to be, the law will scarcely be disputed. Here, then, is the criterion by which the merits of any private car rule must be determined. Surely this association cannot give its sanction to any rule which fails to meet the test.

It is suggested that private cars be exempt from demurrage under all conditions. This would permit the indefinite detention of private cars on public as well as on private sidings. It would mean terminal congestion for which the carrier would have no remedy; it would mean great loss in car efficiency generally; it would put a premium upon the use of private cars, and would work greatly to the disadvantage of those who ship or receive freight in railroad cars. It needs no argument to demonstrate that this proposal flatly contravenes our guiding principle.

For these same reasons the suggestion that private oil-tank cars be exempt from demurrage must be condemned. While it is true that the use of oil-tank cars is somewhat restricted, this fact does not alter their legal status.

It is urged that private cars be exempt while standing on private sidings. If this suggestion were adopted, the coal dealer who derives his supply from mines which ship in private equipment could hold cars for days if need be and team directly to his customers, while his competitor who is served by railroad cars must unload promptly or suffer the demurrage penalty. The rule not only gives an unlawful advantage to the consignee who receives his freight in cars of private ownership, but, by putting a premium upon the use of private cars, unduly prefers the consignor. It will be observed that this fault is not cured by defining private cars as "cars used for the transportation of commodities which the owners of the cars produce, or in which they deal."

It is next suggested that private cars on private sidings be exempt from demurrage when the owners of the cars give their consent. This suggestion has all the vices of the one preceding it with an additional fault peculiarly its own—it puts it within the power of the car owner to discriminate as between consignees. It is only too evident that we are still far from a correct basis.

The rule which meets with the favor of carriers generally, and is supported by not a few private car lines, exempts private cars from demurrage when standing upon the private sidings of their owners. The general and earnest support that this rule enjoys entitles it to more than passing consideration. Let it be assumed that an oil company, employing its own cars, makes a shipment to itself in a city where it has a private siding. A second oil company, likewise using its own rolling stock, ships a car load of oil to the same city, consigned to a dealer who has a private siding. A third shipment is made in a car of railroad ownership. Under the rule now being considered, only the first of these cars would be free from demurrage; its owner could hold it indefinitely as a storehouse or place of business, while the consignees of the other cars are subject to the regular rules. Can there be any question that this is discrimination—a plain violation of the requirement that he who ships or receives freight in a private car shall enjoy no advantages over him who is dependent upon railroad equipment?

The failure of the rule to meet the test shows that a fault must exist, but perhaps does not clearly reveal the precise nature of the fault. In all good faith the private car owner asserts his right to keep his car upon his own track as long as he desires; he even claims the right to hold his car indefinitely on any private siding, provided the owner of the latter consents, and denies the carrier's right to collect a charge. There is a direct and conclusive answer to this contention: When a private car is employed by a carrier, in lieu of its own equipment, as an instrumentality of transportation, it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after transportation is concluded, it leaves the carrier's service.

The error into which the private car owner has fallen is to be laid to the fact that he confuses the two distinct relations which he sustains to the carrier. The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to trans-

port the owner's freight. In one case the car owner, by supplying an instrumentality of transportation, assists the carrier to discharge its public function; in the other his status is that of the ordinary consignor or consignee. Once the car is placed for loading, it is under lease to the carrier for the trip—in passing we may remark that the form of compensation agreed upon is immaterial—and the owner cannot be heard to assert any interest in the car until the lease is determined by the withdrawal of the car from service. In brief, the car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight. This is but a restatement of the cardinal principle, but reiteration is perhaps to be pardoned, if only it will serve to hold us to our proper course.

"But," it is asked, "what service is the carrier giving when it owns neither car nor track?" We may observe that the question would be equally pertinent if the car were owned by a private individual who is neither consignor nor consignee; it would be equally pertinent if the car were a foreign railway car in ante-per-diem days. In either of these latter cases the carrier's right to enforce its regular demurrage rules in order that the car might be available for further service, or be returned home, could hardly be challenged. The query has already been answered—every car in railroad service is a railroad car. The carrier, therefore, gives the same service when a so-called "private" car is detained as it does when a consignor or a consignee detains a car of undisputed railroad ownership.

It would be idle to catalogue all the suggestions that have come to hand with relation to the private car problem. Suffice it to say that we have given them all careful consideration. The one rule which we find unassailable on principle, and non-discriminatory in practical application, is that which makes all cars in railroad serice, irrespective of ownership, subject equally to the demurrage rules. It will be observed that the position which we have taken is strongly reinforced by the definition of "transportation" in the first section of the act to regulate commerce:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof."

Even if the private car owner is unwilling to acknowledge the validity of this principle, surely he has small ground for complaint if placed under the same obligations as all other consignors and consignees to load and unload cars within a reasonable time.

We have undertaken to define the words "in railroad service" in order to obviate the difficulties that would inevitably arise if the code were silent on the question. It seems certain that cars are appropriated to railroad service from the time of placement for loading. It seems equally clear that cars under lading are in railroad service until unloaded and regularly released. A slightly different rule must be adopted to fit the case of the industry performing its own switching service. The carrier can have no means of knowing when the industry places its cars for loading; doubtless such cars cannot be considered appropriated to the carrier's service until placed by the industry upon the interchange tracks. If subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, they are employed in a new and distinct service *which is not at an end until the lading is removed.*

No. 780.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE PROCTER & GAMBLE COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE PROCTER & GAMBLE COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY ET AL., appellees. } No. 780.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the Commerce Court dismissing the petition of the appellant, The Procter & Gamble Company.

The case was instituted in the Commerce Court against the United States and certain common carriers engaged in interstate commerce, to set aside an order of the Interstate Commerce Commission, to enjoin the carriers from collecting in the future certain demurrage charges on cars owned by the Procter & Gamble Company, and to compel the carriers to repay to the Procter & Gamble Company demurrage charges which they had collected on said cars in the past.

The order of the commission referred to was made under circumstances and conditions which are in substance as follows:

The carriers, in accordance with tariffs which they had filed in the office of the commission and posted, as required by law, received from the Procter & Gamble Company and transported over their respective lines of railway in interstate commerce, tank cars owned by that company and used by it in the shipment of cottonseed oil and other articles of traffic.

For the use of said cars, the carriers paid to the Procter & Gamble Company, under their said tariffs, three-fourths of a cent per car for each mile the cars, whether loaded or empty, were hauled over said lines of railway (Rec., 3), and the carriers collected demurrage charges on the cars in accordance with their said demurrage rules, the material portions of which are:

DEMURRAGE RULES.

RULE 1.—*Cars subject to rules.*

> Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose are subject to these demurrage rules, except as follows:
>
> (*a*) Cars loaded with live stock.
>
> (*b*) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.
>
> (*c*) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered, for loading on the orders of a shipper.

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

RULE 2.—*Free time allowed.*

(*a*) Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

(*b*) Twenty-four hours (one day) free time will be allowed.

1. When cars are held for reconsignment or switching orders.

2. When cars destined for delivery to or for forwarding by a connecting line are held for surrender of bill of lading or for payment of lawful freight charges.

3. When cars are held in transit and placed for inspection or grading.

(c) Cars containing freight for transshipment to vessel will be allowed such free time at the ports as may be provided in the tariffs of the carriers.

* * * * *

RULE 7.—*Demurrage charge.*

After the expiration of the free time allowed a charge of $1 per car per day, or fraction of a day, will be made until car is released. (Rec., 10–11.)

After the tariffs referred to had been filed and posted as aforesaid, but before the tariffs pertaining to demurrage charges had become operative, the Procter & Gamble Company filed two complaints in the office of the commission against the carriers who are appellees herein, wherein it alleged that rule 1 of the demurrage rules above set forth, in so far as it provides that private cars under lading on private tracks are in railway service and subject to the demurrage charges fixed by such tariffs until the lading is removed, is unjust and unreasonable and in violation of the act to regulate commerce, particularly sections 1 and 15 thereof. (Rec., 6.)

Thereafter answers denying the violations of law charged in the complaints were filed by the carriers in the commission's office. (Rec., 7.)

On November 14, 1910, after having fully heard the parties upon the issues formed as aforesaid, the commission made its report in the premises (Rec.,

13, et seq.) and entered an order, the body of which reads as follows:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon;
>
> *It is ordered*, That the complaint in this proceeding be, and it is hereby, dismissed. (Rec., 18.)

In its report, after stating the material facts substantially as above set forth, the commission said:

> The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee.
>
> * * * * *
>
> Complainant goes further than to assert its right to be relieved from demurrage on its own cars when standing upon its own tracks within its own works, and asserts that a privately owned car while standing upon a privately owned track should be free from demurrage, even though the car were owned by one private interest and the track by another private interest. In other words, that owners of private tracks and owners of

private cars should be permitted to exchange courtesies, and by mutual consent so relieve cars from the demurrage rules of the carriers. It seems obvious that the acceptance and application of that theory would involve all of the elements of undue preference and unjust discrimination.

The rule which defendants apply to complainant's cars is the same as that applied to all other privately owned tank cars, and the only question seems to be whether or not the demurrage rule is a condition attached to the use of the privately owned cars, which defendants may lawfully maintain.

Manifestly, the law does not impose upon defendants the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both and which is stated definitely in defendants' tariffs. These defendants have said in their tariffs that they will use the privately owned cars and pay three-fourths of 1 cent per mile for such use, and will subject them to the demurrage rules. Complainant, having its cars in use under those conditions, now asks that we relieve it from one of the conditions, which defendants are unwilling to relinquish.

We are of the opinion that defendants are within their lawful rights in establishing and maintaining the rule complained of.

The complaint will be dismissed. (Rec., 17.)

After the order of the commission had been duly served upon the interested parties, the Procter &

Gamble Company filed its petition in the Commerce Court alleging that the order of the commission was invalid and praying for relief as aforesaid. (Rec., 1–8.)

On July 20, 1911, and after the case had been fully heard by the Commerce Court, upon pleadings filed and proofs submitted by the parties, that court rendered its opinion in the premises and entered an order dismissing the petition of the Procter & Gamble Company, from which an appeal was taken to this court as aforesaid. (Rec., 80–88.)

POINTS.

The order of the commission is valid and should not be set aside by the court.

In support of his contention that the order of the commission is invalid, counsel for the Procter & Gamble Company shows that the carriers apply their demurrage rules to all cars used by them in the transportation of freight articles, but it is difficult to see how otherwise they could avoid the undue preference and undue prejudice prohibited by section 3 of the act to regulate commerce.

In section 1 of said act it is provided that—

> The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof * * * and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, * * *.

But it will be seen that there is nothing in the above provisions which compels a carrier to haul in interstate commerce any car it does not own, and if the carrier does arrange to haul cars owned by other parties it may, and indeed must, do so under circumstances which will enable it to avoid the undue preference and undue prejudice referred to above. In this connection the commission in its report said:

> Defendants' demurrage rules are what are commonly termed the "Uniform demurrage rules." They were prepared by a committee of the National Association of Railway Commissioners, composed of a representative from each State that has a railroad commission, and a member of the Interstate Commerce Commission. The rules were fully considered and then adopted by the convention of the association and were later approved, but not prescribed by this commission. In its report to the convention this committee said that the rule here complained of "Is our unequivocal reply to the demand that private cars be accorded special privieges and immunities," and—
>
> "The utterly chaotic condition in which we found the private-car problem calls for a careful and dispassionate inquiry into fundamental principles. Beyond all doubt, the present confusion is to be charged directly to what a distinguished railroad official naively terms 'those exceedingly indefinite arrangements between carriers and shippers respecting employment of private cars.' It is a standing reproach to the railroad world that these con-

tracts for the use of private cars should be so indefinite that the parties can dispute endlessly as to their terms. The situation would be ridiculous were it not so fraught with evil. Your committee is agreed that the carriers' regularly published tariffs should set forth in detail the terms under which private cars will be employed, and they should expressly stipulate that private cars while in railroad service shall be subject to the same demurrage rules as the carriers' regular equipment."

In a report made by the committee on car distribution and car shortage to the preceding convention of the National Association of Railway Commissioners the position that had been taken by the courts and by the Interstate Commerce Commission was epitomized as follows:

"It is the carrier's duty to furnish all facilities of transportation, and it can not permit the presence of any equipment upon the line to work a discrimination as between shippers."

Referring to the above quotation, the committee which formulated the demurrage rules said:

"That this is and ought to be the law will scarcely be disputed. Here, then, is the criterion by which the merits of any private-car rule must be determined. * * * It is urged that private cars be exempt when standing on private sidings. If this suggestion were adopted, the coal dealer who derives his supply from mines which ship in private equipment could hold the cars for days, if need be, and team directly to his customers, while

his competitor who is served by railroad cars must unload promptly or suffer the demurrage penalty. The rule not only gives unlawful advantage to the consignee who receives his freight in cars of private ownership, but by putting a premium upon the use of private cars unduly prefers the consignor. * * * It is next suggested that private cars on private sidings be exempt from demurrage when the owners of the cars give their consent. This suggestion has all the vices of the one preceding it with the additional fault peculiarly its own—it puts it within the power of the car owner to discriminate as between consignees.

* * * * *

"When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after transportation is concluded, it leaves the carrier's service. * * *

"The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee."

* * * * *

A car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight. (Rec., 15–17.)

In the demurrage rules it is provided that where a carrier hauls over its line of railway a private car loaded with freight articles, such car shall be regarded as in the service of the carrier until the lading is removed at point of destination, whether such destination be on one of the carrier's tracks or on a private track, and counsel for the Procter & Gamble Company contends that in upholding this provision the commission committed an error of law, because by such provision the owner of the car is denied the right to use it for storage on such owner's private tracks without paying the carrier demurrage charges; but in making this contention counsel overlooks the fact that without the cooperation of the carrier such storage would be impossible. On the one hand, without the consent of the carrier the owner of the private car can not have his traffic transported therein over the carrier's line of railway, and, on the other hand, the carrier can not consent to such use of a private car except under conditions which will enable it to avoid, as between such owner and other shippers, the undue preference and undue prejudice prohibited by section 3 of the act; and for the purpose of meeting this situation and doing justice to all interested parties the demurrage rules and the rule pertaining to compensation to be paid by the carrier for the use of the private car have been established and put in force.

So far as those rules operate in favor of the Procter & Gamble Company and enable it to have its traffic hauled in its own cars over the carriers' lines of railway, that company wishes to take advantage of them,

but to the extent that the rules operate against the Procter & Gamble Company and prevent it from obtaining an advantage over its competitors whose traffic is transported over said lines of railway in cars owned by the carriers, that company wishes to be relieved from their operation, and in this connection an attempt is made, apparently, to connect with the demurrage charges the provision relating to compensation paid by the carriers for the use of private cars.

However, we have seen that, in the opinion of the commission, the latter provision is in no way connected with the provision relating to demurrage, and that appears to be the opinion also of this court. (*Int. Com. Com.* v. *Diffenbaugh et al.*, decided on Nov. 13, 1911, but not yet reported.)

The commission is not, nor are the carriers, seeking to deprive the Procter & Gamble Company of any advantage over their competitors which that company can secure without the assistance of the carriers by using its capital to purchase cars. The commission and the carriers are simply trying to prevent the Procter & Gamble Company, as shippers, from obtaining a preference over other shippers, where such preference is prohibited by the provisions of said act.

The demurrage rules are general, and, as a practical matter, must be applied generally; that is to say, they must be applied in the same way and indiscriminately to all cars transported by the carriers in interstate commerce over their respective lines of railway, since transportation as defined in section 1 of the act, as above shown, includes all cars and other ve-

hicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof.

The question of whether the demurrage rules are just and reasonable must be determined without reference to the sufficiency of the compensation paid by the carriers for the use of private cars under the rules of the carriers pertaining to such use, and it will be observed that in the proceeding before the commission the Procter & Gamble Company did not ask the commission to pass upon the reasonableness of such compensation; the only question that company requested the commission to decide was whether the demurrage rules were just and reasonable, and, as above shown, that was the only question determined by the commission.

The contention is that in so far as the demurrage rules provide for the payment of demurrage on private cars while standing on private tracks, they are unreasonable and unjust; but we think the opposite of this proposition is clearly shown by what has been said above. However, in this connection there is another matter which may not be unworthy of consideration. The record shows that at the Ivorydale plant of the Procter & Gamble Company the tracks which are referred to as the private tracks of that company have been in fact leased to and are operated by another company, namely, the Ivorydale & Millcreek Valley Railway Company, and that the carriers who are appellees herein pay the latter company $3.50 per loaded car for transporting the tank cars in

question over said tracks and the tracks of said appellees between the interchange tracks of the latter and said Ivorydale plant. (Rec., 54–57.)

It is therefore apparent that the transportation under consideration is not completed when said appellees deliver the loaded tank cars of the Procter & Gamble Company to the Ivorydale & Millcreek Valley Railway Company at the interchange tracks of said appellees. The transportation as such ends only when, in the natural course of business, the cars are delivered by the Ivorydale & Millcreek Valley Railway Company to the Procter & Gamble Company at the plant of the latter, and the cars are subject to the demurrage rules of the carriers in the same manner and to the same extent as would be other cars transported by the carriers in interstate commerce over their respective lines of railway, notwithstanding that the entire capital stock of the Ivorydale & Millcreek Valley Railway Company is owned by the Procter & Gamble Company, and notwithstanding any rule concerning risk the carriers may, as a condition of receiving and transporting private cars, establish and put in force. It is evident that the lawfulness of the demurrage rules, which apply to all cars transported in interstate commerce by the carriers, can not be made to depend upon the question of whether rules pertaining to risk on private cars have been properly established and made effective. We do not deem it necessary, therefore, to enter upon an inquiry concerning the validity of the latter rules.

On the record in this case, and for the reasons above given, we contend that the decree of the Commerce Court, dismissing the petition of the Procter & Gamble Company, is correct and should be affirmed.

Respectfully submitted.

P. J. FARRELL,
Solicitor for
Interstate Commerce Commission,
Appellee.

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